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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

IN RE:
DAVID L. SMITH

Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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March 31, 1994

2-18-94

QUESTIONS PRESENTED

1. Whether an attorney may be disciplined by a circuit court based on the attorney's challenge to that circuit court's view of its interlocutory jurisdiction which is in conflict with that of other circuits?

2. Whether an attorney may be suspended by a circuit court until the attorney pays all monetary sanctions assessed against him or her, where the attorney is financially unable to pay those sanctions?

3. Whether a circuit court's denial of an evidentiary hearing prior to suspending an attorney constitutes an abuse of discretion or a denial of due process?

LIST OF PARTIES

This is an original proceeding in discipline commenced in and by the United States Court of Appeals for the Tenth Circuit against the petitioner David L. Smith. Accordingly, David L. Smith is the only party to this action.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

I. OPINIONS BELOW 1

II. JURISDICTION 2

III. STATUTES INVOLVED 3

A. 28 U.S.C. § 1291. Final Decisions of District Courts 3

IV. STATEMENT OF THE CASE 3

A. Underlying Proceedings 6

B. Procedural History of This Suspension Proceeding 14

C. Status of Reciprocal Discipline in Other Courts 17

1. United States District Court for the District of Colorado 17

2. Supreme Court of Colorado 19

3. United States Court of Appeals for the Federal Circuit 19

REASONS FOR GRANTING THE WRIT 20

A. Whether an Attorney May Be Disciplined by a Circuit Court Based on the Attorney's Challenge to That Circuit Court's View of its Interlocutory Jurisdiction Which Is in Conflict With That of Other Circuits? 23

B. Whether an Attorney May Be Suspended by a Circuit Court Until the Attorney Pays All Monetary Sanctions Assessed Against Him or Her, Where the Attorney Is Financially Unable to Pay Those Sanctions? 35

C. Whether an Attorney Is Entitled to an Evidentiary Hearing Prior to a Court Suspending the Attorney? 37

CONCLUSION 41

APPENDIX
Index to Appendix

TABLE OF AUTHORITIES

CASES

Baird v. State Bar of Arizona,
401 U.S. 1, 91 S. Ct. 702 (1971) 35

Boddie v. Connecticut,
401 U.S. 371, 91 S. Ct. 780 (1971) 35

Budinich v. Becton Dickinson and Co.,
486 U.S. 196, 108 S.Ct. 1717 (1988) 29

Cheng v. GAF Corp.,
713 F.2d 886 (2d Cir. 1983) 25

Click v. Abilene National Bank,
822 F.2d 544 (5th Cir. 1987) 27

Cohen v. Beneficial Industrial Loan Corp.,
337 U.S. 541, 69 S. Ct. 1221
(1949) 9, 10, 13, 20-21, 23-25, 27, 29, 32

Coopers & Lybrand v. Livesay,
437 U.S. 463, 98 S. Ct. 2454 (1978) 24

David v. Hooker, Ltd.,
560 F.2d 412 (9th Cir. 1977) 26

DeSisto College, Inc. v. Line,
888 F.2d 755 (11th Cir. 1989),
cert. denied, 495 U.S. 952 (1990) 24

Douglas v. California,
372 U.S. 353, 83 S. Ct. 814 (1963) 35

Dunkin v. Louisiana-Pacific Corp.,
Nos. 92-1230 and 92-1381 (10th Cir.
February 11, 1993), *cert. denied*,
___ U.S. ___, 114 S. Ct. 87 (1993) 5, 7-11, 30

Eastern Maico Distributors, Inc. v.
Maico-Fahrzeugfabrik,
658 F.2d 944 (3d Cir. 1981) 28

Eavenson, Auchmuty & Greenwald v. Holtzman,
775 F.2d 535 (3d Cir. 1985) 28

Firestone Tire & Rubber Co. v. Risjord,
449 U.S. 368, 101 S.Ct. 669 (1981) 29

Frazier v. Cast,
771 F.2d 259 (7th Cir. 1985) 24, 25

G.J.B. & Associates v. Singleton,
913 F.2d 824 (10th Cir. 1990) . . . 7, 10, 13, 20, 27-29, 33

Gillespie v. United States Steel Corp.,
379 U.S. 148, 85 S. Ct. 308 (1964) 26

Harper v. Virginia State Board of Elections,
383 U.S. 663, 86 S. Ct. 1079 (1966) 35, 36

In re Jeannette Corp.,
832 F.2d 43 (3d Cir. 1987) 28

In re Licht & Semonoff,
796 F.2d 564 (1st Cir. 1986) 27

In re Smith,
10 F.3d 723 (10th Cir. 1993) 1

Liew v. Breen,
640 F.2d 1046 (9th Cir. 1981) 26

M.A. Mortenson Co. v. United States,
877 F.2d 50 (Fed. Cir. 1989) 28

Maggio v. Zeitz,
333 U.S. 56, 68 S. Ct. 401 (1948) 36, 37

Markwell v. County of Bexar,
878 F.2d 899 (5th Cir. 1989) 27

Mesirow v. Pepperidge Farm, Inc.,
703 F.2d 339 (9th Cir. 1983),
cert. denied, 464 U.S. 820 (1983) 26

Optyl Eyewear Fashion International Corp. v. Style Companies, Ltd.,
760 F.2d 1045 (9th Cir. 1985) 24

PPG Industries, Inc. v. Celanese Polymer Specialties Co., Inc.,
840 F.2d 1565 (Fed. Cir. 1988) 28

People v. Tucker,
837 P.2d 1225 (Colo. 1992) 40

Sanko S.S. Co., Ltd. v. Galin,
835 F.2d 51 (2d Cir. 1987) 24, 25

Schware v. Board of Bar Examiners,
353 U.S. 232, 77 S. Ct. 752 (1957) 35

Tinsley v. Mitchell,
804 F.2d 1254 (D.C.Cir. 1986) 37

United States v. Rylander,
460 U.S. 752, 103 S. Ct. 1548 (1983) 36

Utah v. Kennecott Corp.,
14 F.3d 1489 (10th Cir. 1994) 29, 30, 32

White v. General Motors Corporation, Inc.,
908 F.2d 675 (10th Cir. 1990) 37

STATUTES

28 U.S.C. § 1291 . . . . . 3, 24, 26-27

28 U.S.C. § 1291(a)(1) 30

28 U.S.C. § 1292(a)(1) 29

28 U.S.C. § 1927 13

28 U.S.C. § 1254(1) 2

35 U.S.C. § 285 28

OTHER AUTHORITY

Black's Law Dictionary 1059 (5th ed. 1979) 40

Fed. R. App. P. 46 2

Rule 602(c), Local Rules of Practice of the U.S.
District Court for the District of Colorado 21

S. Ct. R. 10.1 . . . . . 23, 42

S. Ct. R. 10.1(a) 23, 33-34

10th Cir. R. 36.1 40

10th Cir. R. 36.3 . . . . . 40, 41

10th Cir. R. 46.5 2

10th Cir. R. Addendum 3, §§ 4.3 & 8.1 . . . . . 38, 39

No._____

IN THE
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IN RE:
DAVID L. SMITH

Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

David L. Smith, Esq., by his undersigned attorneys, hereby petitions this Court to grant a writ of certiorari to review the November 29, 1993 Order of the United States Court of Appeals for the Tenth Circuit in this matter.

I. OPINIONS BELOW

The Order of the Court of Appeals for the Tenth Circuit sought to be reviewed herein is reported at *In re Smith*, 10 F.3d 723 (10th Cir. 1993), and is reprinted in the appendix ("App.")

hereto, at A1, *infra*. Other orders entered in various actions underlying this original proceeding in discipline are reprinted as appropriate in the appendix as indicated.

II. JURISDICTION

This case commenced as an original proceeding in discipline in and by the Tenth Circuit Court of Appeals pursuant to Fed. R. App. P. 46 and 10th Cir. R. 46.5, and the inherent authority of the court to discipline members of its bar. On November 29, 1993, the Tenth Circuit issued an Order suspending the petitioner from practice before that court until certain monetary sanctions are paid. On December 13, 1993, Smith filed a Motion for Stay of Suspension before the Tenth Circuit and a Petition and Suggestion for Rehearing *En Banc*. The Tenth Circuit denied that motion on January 3, 1994. *In re Smith*, No. 93-631, Order (10th Cir., January 3, 1994). App. at A7. Thus, the matter below is final and ripe for review by this Court. The jurisdiction of this Court to review the order of the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1) based on the entry of a final order on

November 29, 1993 by the Tenth Circuit, and the subsequent denial of rehearing on January 3, 1994.

III. STATUTES INVOLVED

A. 28 U.S.C. § 1291. Final Decisions of District Courts

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

IV. STATEMENT OF THE CASE

David L. Smith graduated from Southern Methodist University in 1972 as a member of the Order of the Coif. From 1972 to 1974, he was employed by the United States Department of Justice, in the Civil Rights Division, in Washington, D.C. Thereafter, Smith attended Harvard University Law School, and received his L.L.M. in Constitutional Law and Litigation in 1975.

From 1976 to 1977, he was employed at the law firm of Carrington, Coleman, Sloman, Johnson & Blumenthal in Dallas, Texas, doing labor litigation. Thereafter, Smith served as a Deputy District Attorney in Denver, Colorado, during which time he conducted approximately twenty-five jury trials. Since 1979, Smith has been a solo practitioner emphasizing civil rights and employment litigation. App. at A116, A141-146 (affidavit attached to *Deherrera v. Denver*, Nos. 93-1070 and 93-1139, Response to Order to Show Cause (10th Cir., filed March 7, 1994)). Since finishing law school, he has maintained good standing before each bar to which he has been admitted, and has never previously been the subject of any attorney discipline, contempt or criminal charges.

On November 29, 1993, Smith was suspended from practice before the Tenth Circuit Court of Appeals until he pays each sanction imposed against him by the Tenth Circuit or by the United States District Court for the District of Colorado, and applies for reinstatement to the Tenth Circuit. As a condition to applying for such reinstatement, Smith must demonstrate that he has paid all of

the sanctions. *In re Smith*, No. 93-631, Order (10th Cir. Nov. 29, 1993). App. at A1. The sanctions in question now total more than $50,000.

The genesis of the proceedings leading up to his suspension was an Order to Show Cause issued to Smith by the Tenth Circuit on September 15, 1993, directing Smith to show cause why he should not be fined, disbarred or otherwise disciplined under Rule 46.5 of the Local Rules of the Tenth Circuit for filing an allegedly frivolous appeal in *Deherrera v. Denver*, Nos. 93-1070 and 93-1139 (10th Cir. September 3, 1993), in light of: (a) the prior dismissal of interlocutory appeals filed by Smith in *Sandlin v. Canady (In re Canady)*, No. 92-1169 (10th Cir. April 27, 1993), and *Dunkin v. Louisiana-Pacific Corp.*, Nos. 92-1230 and 92-1381 (10th Cir. February 11, 1993), *cert. denied*, ____ U.S. ____, 114 S. Ct. 87 (1993); and (b) Smith's appeal deemed frivolous in *Casillan v. R.T.D.*, Nos. 92-1009 and 92-1039 (10th Cir. January 15, 1993). *In re Smith*, Order to Show Cause, 93-631 (10th Cir. Sept. 15, 1993). App. at A5.

A. Underlying Proceedings

The following is a summary of the four actions which originally prompted the Tenth Circuit to issue its September 15, 1993 Order to Show Cause, and which ultimately constituted the basis for Smith's suspension on November 29, 1993:[1]

1. *Sandlin v. Canady (In re Canady)* was an adversary proceeding commenced by Smith on behalf of the plaintiff on January 14, 1991, in the United States Bankruptcy Court for the District of Colorado. *Sandlin v. Canady*, 91-1029-CEM (D.Colo.B.R.) (90-15194-SBB, Chapter 7). Previously, on June 28, 1990, a jury had returned a verdict of $142,226 damages in the underlying age discrimination case in which the plaintiff was represented by Smith. In addition, $27,752 in attorney fees were awarded pursuant to statute. Following entry of judgment, the defendant Canaday filed for bankruptcy.

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[1]A recitation of the facts of the cases in which the district court sanctions were imposed is necessary to provide this Court with a full understanding of the procedures which led to the suspension by the Tenth Circuit. This petition does not seek any review of the district court sanctions imposed against Smith.

On September 27, 1991, the bankruptcy court dismissed the plaintiff's claims and later assessed $1,000 in Rule 11 sanctions against Smith. On March 17, 1992, the district court affirmed part of those rulings, and remanded portions of the plaintiff's case to the bankruptcy court for further proceedings because the dismissal did not dispose of the entire controversy between the plaintiff and the debtor-defendant. Smith appealed this order to the Tenth Circuit. By Order dated on February 4, 1993, the Tenth Circuit affirmed the district court, *Sandlin v. Canady (In re Canady)*, No. 92-1100 Order (10th Cir. February 4, 1993), but when Smith later petitioned for rehearing, the Tenth Circuit panel acknowledged that it previously lacked jurisdiction to take up the appeal, vacated the prior order, and further dismissed that petition on jurisdictional grounds based on the lack of a final order below. *Sandlin v. Canady (In re Canady)*, No. 92-1169, Order and Judgment at 2 (10th Cir. April 27, 1993) (*citing G.J.B. & Associates v. Singleton*, 913 F.2d 824, 827 (10th Cir. 1990)). App. at A9-12.

2. *Dunkin v. Louisiana-Pacific Corp.* was an action for age, gender and disability discrimination in employment that was

commenced by Smith on behalf of the plaintiff on February 7, 1992 in the United States District Court for the District of Colorado. *Dunkin v. Louisiana-Pacific Corp.*, No. 92-N-243 (D.Colo.). In the course of discovery in that action, disputes arose over the confidentiality of certain documents. On July 9, 1992, the defendant's motion for protective order was granted and sanctions were imposed against the plaintiff and/or her attorney (Smith) for refusing to sign a confidentiality agreement as a condition precedent to the plaintiff's inspection of certain documents. At a subsequent hearing to determine the amount of the sanctions, the district court assessed sanctions in the amount of $4,060 against Smith, to be paid by July 27, 1992, which amount was increased by $481.25 to compensate for defendant's counsel's attendance at that hearing. Plaintiff's subsequent motion for a stay of execution pending appeal of the sanctions order was denied; and the sanctions were further ordered immediately payable. The sanctions were never paid, and, as a consequence, the defendants filed with the district court a motion to dismiss the appeal or, in the alternative,

to condition the release of the confidential documents on Smith's payment of the sanctions.

On July 27, 1992, Smith filed a notice of appeal with the Tenth Circuit. The parties were instructed to brief the limited issue of jurisdiction to hear such an appeal. Smith relied upon the collateral order doctrine first enunciated by this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221 (1949), as authority for his appeal. *See Dunkin v. Louisiana-Pacific Corp.*, No. 92-1230, Brief on Jurisdictional Issue (10th Cir., filed August 31, 1992). App. at A13, A18-25. Defendant also briefed that issue, but also filed with the Tenth Circuit a motion for sanctions related to that appeal.

On October 29, 1992, sanctions were imposed against Smith by a magistrate judge in the ongoing district court action relating to a different discovery issue. In connection with that order, a hearing was held before the district judge on December 10, 1992, and the amount of this additional sanction was set at $1,870.93. Smith appealed this sanctions order to the Tenth Circuit on December 16, 1992. The defendants filed a motion to dismiss the

appeal, again requesting that sanctions be imposed against Smith for having taken the appeal.

On February 11, 1993, the Tenth Circuit dismissed both appeals for lack of jurisdiction because a final order had not yet been entered in the district court, again citing the *G.J.B.* case. *Dunkin v. Louisiana-Pacific Corp.*, Nos. 92-1230 and 92-1381, Order at 2 (10th Cir. February 11, 1993) (*citing G.J.B. & Associates v. Singleton*, 913 F.2d 824, 827 (10th Cir. 1990)). App. at A24-25. In addition, the court found that sanctions relating to the appeal were appropriate. The Tenth Circuit remanded the case to determine the amount of such sanctions on appeal. On February 25, 1993, Smith filed a petition for rehearing before the Tenth Circuit. On March 17, 1993, that petition was denied. *Dunkin v. Louisiana-Pacific Corp.*, Nos. 92-1230 and 92-1381 Order (10th Cir. March 17, 1993).

On June 15, 1993, Smith submitted a petition for writ of certiorari to this Court by which he sought review of the Tenth Circuit's interpretation and application of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221 (1949),

particularly in that Tenth Circuit precedent is in conflict with that of other circuits. Certiorari was denied. *Dunkin v. Louisiana-Pacific Corp.*, ____ U.S. ____, 114 S. Ct. 87 (1993). On remand, a hearing on this matter was held on February 17, 1994, before the district court, and $17,506.50 in additional attorney fees and $579.33 in costs were levied against Smith solely for his "frivolous" attempt to invoke the Tenth Circuit's interlocutory jurisdiction. App. at A35-37.

3. *Casillan v. R.T.D.* was commenced by Smith on behalf of the plaintiff on September 27, 1990 in the United States District Court for the District of Colorado alleging, *inter alia*, retaliatory discharge. *Casillan v. R.T.D.*, 90-S-1722 (D.Colo.). On December 10, 1991, the district court dismissed the action for failure to state a claim. In addition, monetary sanctions were also imposed by the district court against Smith for filing "unwarranted and frivolous" motions for reconsideration of separate magistrate rulings related to discovery matters.

Smith appealed both the dismissal of the case, and the imposition of sanctions. The Tenth Circuit affirmed the dismissal,

assessed additional sanctions against Smith for continuing a groundless action and for bringing a frivolous appeal, and remanded to the district court for a determination of the amount. *Casillan v. R.T.D.*, Nos. 92-1009, 92-1039, Order and Judgment (10th Cir. January 15, 1993). App. at A39-62. On remand, the district court assessed sanctions in the amounts of $4,525, $3,269 and $6,687.50 in favor of three defendants' attorneys. The Tenth Circuit thereafter affirmed those sanctions. *Casillan v. R.T.D.*, No. 93-1158, Order and Judgment (10th Cir. December 14, 1993). App. at A63-66. On March 14, 1994, Smith submitted a petition for writ of certiorari to this Court by which he seeks review of the sanctions orders.

4. *Deherrera v. Denver* was a gender discrimination case commenced by Smith on behalf of the plaintiff on December 21, 1990 in the United States District Court for the District of Colorado. *Deherrera v. Denver*, 90-B-2260 (D.Colo.). On January 25, 1993, the district court denied four motions filed by the plaintiff for reconsideration of four separate magistrate's rulings. The court also imposed sanctions of $7,627.50 pursuant

to 28 U.S.C. § 1927, and upheld a sanction of $2,287.50 imposed by the magistrate pursuant to Rule 11.

The attorney fee awards were appealed to the Tenth Circuit. The parties were instructed to brief the limited issue of jurisdiction to hear such an appeal. Defendant's counsel briefed that issue but also filed with the Tenth Circuit a motion for sanctions related to that appeal. In briefing the jurisdictional issue, Smith again cited *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221 (1949) as support for the jurisdictional basis of his appeal. *See Deherrera v. Denver*, No. 93-1070, Brief on Jurisdictional Issue (10th Cir., filed April 30, 1993). App. at A67, A79-83. However, interpreting the court's instruction as strictly limiting the parties to the jurisdictional issue, Smith believed that it would be inappropriate for him to brief the attorney fee issue and did not do so. On September 3, 1993, the Tenth Circuit dismissed the appeal for lack of jurisdiction due to the continued pendency of the case in the district court, once again citing *G.J.B. & Associates v. Singleton*, 913 F.2d 824, 827 (10th Cir. 1990). *Deherrera v. Denver*, Nos. 93-1070 and 93-1139, Order and Judgment at 4 (10th

Cir. September 3, 1993) (*per curiam*). App. at A102, A105-109. Additionally, the court imposed $1,200 in attorney fees against Smith for bringing an allegedly frivolous appeal, and concluded that Smith's actions in this and other appeals warranted review by the court's disciplinary panel. A petition for rehearing was filed and denied as untimely. On February 20, 1994, the Tenth Circuit issued an Order to Show Cause directing Smith to demonstrate why he should not be held in contempt for failing to pay these sanctions. *Deherrera v. Denver*, Nos. 93-1070 and 93-1139, Order to Show Cause (10th Cir., February 20, 1994). App. at A113. On March 7, 1994, Smith filed his response to that order and, further, requested a hearing. *Deherrera v. Denver*, Nos. 93-1070 and 93-1139, Response to Order to Show Cause (10th Cir.). App. at A116. No ruling by the Tenth Circuit has yet been made on the contempt issue.

B. Procedural History of This Suspension Proceeding

As stated above, on September 15, 1993, the Tenth Circuit issued an Order to Show Cause to Smith directing him to show cause why he should not be fined, disbarred or otherwise

disciplined under Rule 46.5 of the Local Rules of the Tenth Circuit, for filing allegedly frivolous appeals. *In re Smith*, No. 93-631, Order (10th Cir., November 29, 1993). App. at A1. On October 4, 1993, Smith filed a response to the Order to Show Cause. Along with his response, Smith submitted a written request for an evidentiary hearing or designation of a special master for purposes of conducting an evidentiary hearing. In so doing, Smith was seeking an opportunity to demonstrate that he did not have a full and fair opportunity to litigate the sanctions issues in the underlying cases, and that his appeals of the interlocutory sanctions orders were not frivolous. On October 22, 1993, that request was denied. Thereafter, with the permission of the court, Smith submitted a supplemental response on November 2, 1993. On November 12, 1993, oral argument was held before the Tenth Circuit Disciplinary Panel at which Smith appeared *pro se*. At that oral argument Smith argued that his underlying appeals of sanctions were not frivolous because they were based on a good faith assertion of applicable precedents of other circuit courts of appeals. However, the Disciplinary Panel refused to go behind the

conclusion of the other three judge panels that the appeals were frivolous.

On November 29, 1993, the Tenth Circuit issued its Order suspending Smith from practice before the Tenth Circuit "until all sanctions are paid" which were imposed on him by the Tenth Circuit or the district court in the four underlying cases. *In re David L. Smith*, No. 93-631, Order at 2 (10th Cir. November 29, 1993). App. at A1-3. As indicated above, the total amount of all sanctions required to be paid before Smith may seek reinstatement presently exceeds $50,000.

On December 13, 1993, Smith filed, by undersigned counsel, a Motion for Stay of Suspension with the Tenth Circuit and a Petition and Suggestion for Rehearing *En Banc*. The Tenth Circuit denied that motion on January 3, 1994. *In re Smith*, 93-631, Order (10th Cir., January 3, 1994). App. at A7. On January 13, 1994, Smith filed a Motion for Stay of Suspension Pending Petition for Writ of Certiorari with the Tenth Circuit. By Order dated January 25, 1994, the Tenth Circuit denied that motion. *In re Smith*, 93-631, Order (10th Cir. January 25, 1994). App. at

A8. The Order states, however, that Chief Judge Stephanie Seymour would have granted the motion and dissented therefrom. *Id.*

On February 14, 1994, Smith filed an Application for Stay Pending Petition for Writ of Certiorari with Justice Ruth Bader Ginsburg of this Court. That Application was denied on February 16, 1994. *In re David Smith*, No. A-673 (February 16, 1994).

C. Status of Reciprocal Discipline in Other Courts

After the entry of the Tenth Circuit's November 29, 1993 suspension order, Smith provided notice thereof to all courts before which he is admitted to practice. In turn, the suspension by the Tenth Circuit has or may result in reciprocal discipline in all other courts to which Smith is admitted to practice.

1. United States District Court for the District of Colorado

On December 8, 1993, the Committee on Conduct of the United States District Court for the District of Colorado informed Smith that, pursuant to Local Rule of 83.6 of that court, "simultaneous and identical discipline shall be imposed by the United States District Court for the District of Colorado *nunc pro*

tunc from the date of judgment of the United States Court of Appeals for the Tenth Circuit [November 29, 1993]." App. at A151. However, also pursuant to Rule 83.6, Smith was permitted an opportunity to show cause why simultaneous and identical discipline should not be imposed by the district court. *Id.* Smith's response to the Committee on Conduct included with it, as demonstrative of good cause, those pleadings and supporting materials which he had filed before the Tenth Circuit in conjunction with his motions for stay and rehearing to the Tenth Circuit. After Smith responded, the Committee on Conduct notified Smith on January 18, 1994, that it was seeking guidance from the district court as to his current practice status because Smith had demonstrated good cause sufficient to warrant further investigation and a hearing by a panel of committee members. App. at A153. Yet the district court Committee on Conduct noted that "it would be prudent for you and your client to assume that . . . Mr. Smith currently is under suspension in district court." *Id.*

On January 26, 1994, Smith received notice that the Committee on Conduct would conduct a hearing on February 15,

1994 for a determination of good cause as to whether a different sanction than that of the Tenth Circuit should be imposed. App. at A155-157. At that hearing, Smith offered testimony further supporting his good faith, lack of malice or vexatiousness, and inability to pay as good cause shown for the consideration of lesser, or no, sanction by the district court. The results of that proceeding are not yet known.

2. Supreme Court of Colorado

On December 15, 1993, Disciplinary Counsel of the Colorado Supreme Court informed Smith that it was commencing an investigation based upon the Tenth Circuit's suspension order. That investigation is active and remains pending. App. at A158-160.

3. United States Court of Appeals for the Federal Circuit

On January 19, 1994, the United States Court of Appeals for the Federal Circuit issued an Order directing Smith to respond within fourteen days, otherwise a reciprocal suspension would be imposed upon him in that court. App. at A161. Smith filed a response on January 31, 1994, and has continued to supplement

that response as appropriate. Consideration of identical suspension in that circuit remains pending.

REASONS FOR GRANTING THE WRIT

Smith has been suspended from practice by the Tenth Circuit for conduct which, had it taken place before any of at least four other circuit courts would not only have been non-frivolous, but, indeed, would have been meritorious. Thus, Smith was suspended from practice, essentially, for advancing a jurisdictional argument which is the subject of a sharp split among the Circuit Courts of Appeals. As one among three circuits, the Tenth Circuit has interpreted the collateral order rule, first enunciated by this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221 (1949), as inapplicable to appeals from monetary sanctions orders entered by district courts against attorneys prior to entry of final judgment in the underlying district court action. *See G.J.B. & Associates v. Singleton*, 913 F.2d 824, 827 (10th Cir. 1990). At least four circuit courts hold otherwise -- allowing immediate appeals by attorneys of district court sanctions imposed against them.

Another principal component behind Smith's suspension relates to district court sanctions which the Tenth Circuit has ordered him to pay as a condition for lifting the appellate suspension, yet those district court sanctions have not yet been reviewed by the Tenth Circuit and indeed are not ripe for review under that circuit's interpretation of *Cohen*.[2]

Further, Smith is financially incapable of paying the monetary sanctions underlying the suspension, placing him in an unconstitutional "Catch-22" dilemma. The duration of Smith's suspension will extend at least until he pays the underlying district court and Tenth Circuit monetary sanctions. The Tenth Circuit

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[2]As can be gleaned from § IV. A. above, the frequency of district court sanctions imposed against Smith is attributable largely to his seeking reconsideration by a district court judge of adverse discovery and pre-trial orders entered by magistrate judges. Pursuant to the then-applicable Local Rules in the United States District Court for the District of Colorado, Rule 602(c) (effective until June 1, 1992) "[p]arties seeking or responding to a reconsideration of a magistrates' order should expect that attorneys fees will be awarded to the prevailing party on such review." Because seeking reconsideration is reasonably necessary to preserve future right of appeal, pursuing reconsideration was necessary even in the face of the expectation of an adverse fee ruling.

suspension is causing a chain reaction of automatic suspension determinations or disciplinary proceedings in other courts. The practice of law is Smith's only source of income and livelihood. Thus, the effect of the Order is that Smith cannot practice law until he pays the underlying monetary sanctions, but cannot pay them unless he is allowed to practice.

Finally, Smith contends that the Tenth Circuit should have afforded him the opportunity to present evidence, by expert testimony or otherwise, in defense of his assertion that the appeals underlying the Tenth Circuit's consideration of suspension were, in fact, brought in good faith and were not frivolous. Smith contends that, because the Tenth Circuit's rules make provision for such hearings, denial of such a hearing was an abuse of discretion by the court resulting in a denial of due process. Smith further contends that the Court's subsequent reliance on the underlying cases, without analysis of those cases for estoppel purposes, was legally erroneous and resulted in a denial of due process.

For the reasons demonstrated below, the Tenth Circuit's precedent is "in conflict with the decision of another United States

court of appeals on the same matter," and the actions of the Tenth Circuit represent a departure from the "accepted and usual course of judicial proceedings" significant enough to warrant the exercise of this Court's supervisory powers. Supreme Court Rule 10.1(a) ("S. Ct. R.") . Thus, there exist "special and important reasons" for review by this Court. S. Ct. R. 10.1.

A. Whether an Attorney May Be Disciplined by a Circuit Court Based on the Attorney's Challenge to That Circuit Court's View of its Interlocutory Jurisdiction Which Is in Conflict With That of Other Circuits?

Underlying this entire proceeding is the question of whether attorney fee sanctions, the amount of which has been fixed, are immediately appealable by a sanctioned attorney as a collateral order under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221 (1949). In attempting to seek review of sanctions that had been levied against him, Smith advanced the argument that the Tenth Circuit had interlocutory jurisdiction to hear his appeal under the collateral order doctrine articulated in *Cohen*. Under the *Cohen* doctrine, in determining when a collateral order is a final disposition such that appellate jurisdiction

is conferred pursuant to 28 U.S.C. § 1291, an order "must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S. Ct. 2454, 2458 (1978) (*citing Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546, 69 S. Ct. at 1225-26). Application of these criteria to appeals of fixed attorney fee sanctions is the subject of a sharp split of authority among the circuit courts of appeals which has never been addressed by this Court.

Specifically, the Second, Seventh, Ninth, and Eleventh Circuits hold that, where a monetary sanctions order is entered against an attorney by a district court, such an order is immediately appealable because the *Cohen* criteria have been fulfilled. *See DeSisto College, Inc. v. Line*, 888 F.2d 755, 762-63 (11th Cir. 1989), *cert. denied*, 495 U.S. 952 (1990); *Sanko S.S. Co., Ltd. v. Galin*, 835 F.2d 51, 53 (2d Cir. 1987); *Frazier v. Cast*, 771 F.2d 259, 262 (7th Cir. 1985); *Optyl Eyewear Fashion International Corp. v. Style Companies, Ltd.*, 760 F.2d 1045,

1047, n.1 (9th Cir. 1985) (relying on both § 1291 "final order" and *Cohen* cases). The reasons given by the circuit courts which analyze the jurisdictional issue under *Cohen* are several. First, the award of attorney fees as a sanction is a conclusive determination. *See Sanko S.S. Co., Ltd. v. Galin*, 835 F.2d at 53; *Frazier v. Cast*, 771 F.2d at 262. Second, the issue of sanctions is distinct from the merits of the action. *Id.* Finally, and significantly for purposes of this case, a sanctions award against counsel: (a) may be personally burdensome, both financially and in that it may generate certain ethical problems, *Cheng v. GAF Corp.*, 713 F.2d 886, 889 (2d Cir. 1983); and (b) is often not effectively reviewable upon entry of final judgment, because, among other things, counsel may withdraw or be dismissed from a case for any number of reasons prior to the conclusion of the case, the client may prevail on the merits, settle the case or otherwise elect not to appeal, thereby precluding counsel's ability to challenge the sanctions entered against him. *See Sanko S.S. Co., Ltd. v. Galin*, 835 F.2d at 53; *Frazier v. Cast*, 771 F.2d at 262.

In addition, the Ninth Circuit has determined that attorney fee sanctions are immediately appealable because they are "final orders" pursuant to 28 U.S.C. § 1291. *See David v. Hooker, Ltd.*, 560 F.2d 412, 415 (9th Cir. 1977); *see also Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339, 345 (9th Cir. 1983), *cert. denied*, 464 U.S. 820 (1983); *Liew v. Breen*, 640 F.2d 1046, 1048 (9th Cir. 1981). The Ninth Circuit agreed with this Court and reasoned that "the requirement of finality is to be given a 'practical rather than technical construction.'" *David v. Hooker*, 560 F.2d at 416 (quoting *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53, 85 S. Ct. 308, 311 (1964)). "As in the case of a civil contempt order, the non-party [attorney] cannot argue the propriety of the [ ] sanction for attorney's fees in an appeal from the final judgment as a party to the suit would be able to do. Unless he can obtain a review of the order and sanction at the time it is imposed, a non-party will have no right of review at all." *Id.* at 417.

In contrast, the First, Fifth and Tenth Circuits hold that an attorney must wait until the underlying action has concluded until

attorney fee sanction orders may be appealed, at least when counsel has not withdrawn. *See G.J.B. & Assoc. v. Singleton*, 913 F.2d 824, 827-29 (10th Cir. 1990); *Click v. Abilene National Bank*, 822 F.2d 544, 544-45 (5th Cir. 1987); *In re Licht & Semonoff*, 796 F.2d 564, 568-72 (1st Cir. 1986). The First and Fifth Circuits do not consider the *Cohen* standard to be applicable at all, nor do they recognize discovery sanctions to be "final orders" under 28 U.S.C. § 1291. *In re Licht & Semonoff*, 796 F.2d at 568-72; *Click v. Abilene National Bank*, 822 F.2d at 544-45. However, the Fifth Circuit has allowed immediate appeals when counsel has withdrawn from the underlying action. *Markwell v. County of Bexar*, 878 F.2d 899, 901 (5th Cir. 1989). The Tenth Circuit's rationale for precluding interlocutory appeals of any sanctions orders against counsel is that there is "nothing to prohibit an attorney of record from appealing a sanction order when the main case concludes." *G.J.B. & Assoc. v. Singleton*, 913 F.2d at 829.[3]

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[3]Additionally, a third group of circuits has addressed interlocutory appellate jurisdiction in related situations leaving unclear where they would stand when confronted with Smith's precise circumstances. For example, the Tenth

Thus, Smith's jurisdictional position that resulted in his suspension appears to be a majority circuit view under the facts applicable to him, and the Tenth Circuit's position as stated in *G.J.B.* is in the minority.[4] In any event, whether Smith was

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Circuit in *G.J.B.* cited with approval *Eastern Maico Distributors, Inc. v. Maico-Fahrzeugfabrik*, 658 F.2d 944, 948-49 (3d Cir. 1981) for its position against interlocutory appellate jurisdiction. Yet *Eastern Maico* involved discovery sanctions against a *party* as well as its attorney, and the Third Circuit has permitted an interlocutory appeal of sanctions by an attorney who had withdrawn from the underlying action. *See Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 537-40 (3d Cir. 1985); *see also In re Jeannette Corp.*, 832 F.2d 43, 46 (3d Cir. 1987) (declining, *sua sponte*, to exercise jurisdiction over an immediate appeal of sanctions against an attorney in bankruptcy proceedings solely because the amount of sanctions had not yet been determined). Similar uncertainty exists respecting the position of the Federal Circuit. *Compare M.A. Mortenson Co. v. United States*, 877 F.2d 50, 52 (Fed. Cir. 1989) (attorney fee award for discovery violations imposed against United States, but not its attorney, not immediately appealable) *with*, *PPG Industries, Inc. v. Celanese Polymer Specialties Co., Inc.*, 840 F.2d 1565, 1567-68 (Fed. Cir. 1988) (attorney fee award against party under the "exceptional case" provision of 35 U.S.C. § 285 immediately appealable).

[4]The specific result in *G.J.B.* is inexplicable given its holding in that, after announcing its clear position against accepting interlocutory jurisdiction in such circumstances, the Tenth Circuit actually accepted such jurisdiction over an

advancing a majority circuit position or one recognized by a solid minority of circuits is irrelevant -- the fact remains that he was asserting a jurisdictional position well-grounded in law and fact, recognized as such by several circuits, and not contrary to any Supreme Court precedent.[5]

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appeal of a district court order sanctioning an attorney. *G.J.B. & Assoc. v. Singleton*, 913 F.2d at 829 (reversing sanction award and remanding for further proceedings consistent with due process). The Tenth Circuit's one-time exercise of interlocutory jurisdiction in these circumstances when the issue was one of first impression before that court stands directly contrary to this Court's repeated admonition that "[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 203, 108 S.Ct. 1717, 1722 (1988) (*quoting Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379-80, 101 S.Ct. 669, 676 (1981)).

[5]Further, because the district court orders were entered as "immediately payable," Smith had a good faith and well-reasoned belief that such orders were in the nature of injunctive orders and, therefore, were immediately appealable interlocutory orders under 28 U.S.C. § 1292(a)(1). Indeed, the Tenth Circuit has recently stated that, under the *Cohen* rule, "[f]or appellate jurisdiction in [a] case, the challenged order must (1) have the practical effect of refusing or granting an injunction, (2) threaten a serious, perhaps irreparable, consequence, and (3) be effectually challenged only by immediate appeal." *Utah v. Kennecott*

In one of the four cases underlying his suspension, *Dunkin v. Louisiana Pacific Corp.*, *supra.* at 5-7, Smith submitted an unsuccessful petition for writ of certiorari to this Court seeking review of the interlocutory jurisdictional issue. Thus, Smith is, to some degree, being penalized for having laid a foundation directed at assisting this Court in resolving a genuine circuit conflict. Indeed, if Smith, or any other similarly situated attorney, were to delay appeal of district court sanctions until the district court proceedings had concluded, based on the jurisdictional bar imposed by the Tenth Circuit, it would be most difficult to ever achieve a resolution of the circuit conflict by this Court. Awaiting a final district court judgment would obviously render the unresolved matter of interlocutory jurisdiction moot. The only other means available for this Court to resolve this *bona fide* split among the circuits would be by a beneficiary of a district court sanction order

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Corp., 14 F.3d 1489 (10th Cir. 1994) (*emphasis added*). Clearly, any district court order requiring immediate payment of a sanction has the effect of a mandatory injunction and, thus, should be immediately appealable under 28 U.S.C. § 1291(a)(1).

who, on appeal in the Second, Seventh, Ninth or Eleventh Circuit, suffered the reversal of the sanction order upon an interlocutory appeal, and then sought review by this Court of the issue of whether that circuit had interlocutory jurisdiction to have heard the matter.

The time-honored system by which conflicts among circuits are ultimately resolved, whether by Supreme Court determination, increasing uniformity among the circuits over time or legislative action, would be gravely disrupted by circuit courts of appeals which suspend lawyers simply for advancing a conflicting position of another circuit before that court. The chilling effect under such circumstances would stifle robust debate over and challenge of inconsistent, even erroneous legal interpretations that enable the Supreme Court to fulfill its supervisory role and resolve circuit conflicts after complete adjudications by the circuit courts.

Although this Court does not have to reach the precise issue which is the subject of this split of authority among the circuits in order to find that Smith's suspension was improperly imposed, this case, nevertheless, presents the opportunity to resolve this

jurisdictional conflict which has vexed the circuit courts for over the last decade. Smith submits that the view of the Second, Seventh, Ninth and Eleventh Circuits in favor of interlocutory appellate jurisdiction of monetary sanctions against attorneys is the better reasoned approach. In refusing to apply the *Cohen* doctrine to attorney fee orders awarded solely against non-party counsel of record in the district court, the view adopted by the Tenth Circuit misreads *Cohen* and its criteria for interlocutory appellate jurisdiction. Smith believes that the Tenth Circuit holding reflects a practical misunderstanding about the policy and purpose behind § 1291 and the *Cohen* collateral order doctrine.[6] Should this Court

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[6]Indeed, the Tenth Circuit has consistently exhibited a willingness to limit application of *Cohen* collateral order doctrine. In fact, the question of whether *Cohen* applies to immediate appeals of orders affecting settlements has recently been the subject of oral argument before this Court in a case arising out of the Tenth Circuit. *See Digital Equipment Corp. v. Desktop Direct Inc.*, No. 93-405, 62 U.S.L.W. 3583 (March 8, 1994), *on oral argument* (February 22, 1994) (reviewing, in part, the Tenth Circuit's unwillingness to apply *Cohen* to appeal under the collateral order doctrine); *see also Utah v. Kennecott Corp.*, 14 F.3d 1489 (10th Cir. 1994) (refusing to find orders affecting settlement agreements immediately appealable). This Court may wish to use this case to clarify the *Cohen* rule should *Digital Equipment*

determine that resolution of the split of authority among the circuits is appropriate and necessary, Smith submits that he stands prepared to comprehensively brief the issue to the Court.

Finally, the Tenth Circuit's suspension of Smith represents a further significant "depart[ure] from the accepted and usual course of judicial proceedings," S. Ct. R. 10.1(a), because it represents a prejudgment, perhaps even an "elimination," of the appellate process. In particular, the Tenth Circuit suspended Smith until he pays certain sanctions levied against him by including those imposed by the district court. However, the Tenth Circuit rejected as not being ripe Smith's appeal from such sanction orders based on *G.J.B. & Associates v. Singleton*, 913 F.2d 824 (10th Cir. 1990). Therefore, in suspending Smith until those district court sanctions have been paid, the Tenth Circuit has applied its view on this issue such that it has prejudged the merits of those sanctions as well as Smith's prospective appeals therefrom.

Corp. v. Desktop Direct Inc. prove to be an inadequate vehicle for clarifying the law in this area.

Subsumed in this issue is the question of whether a circuit court may suspend lawyers for non-disciplinary sanctions entered by other courts, including its district courts. If one strips away the Tenth Circuit's rationale for suspending Smith based upon his invoking interlocutory appellate jurisdiction contrary to Tenth Circuit precedent, but clearly permitted in other circuits, and rejects as a basis for circuit suspension those district court sanctions not yet ripe for appellate review, the sanctions in *Casillan*, *see supra* at 7-8, stand alone as the basis for his suspension. Smith submits that those isolated monetary sanctions in *Casillan* are insufficient as a matter of law to justify a circuit suspension, or, at a minimum, that the case should be remanded for the Tenth Circuit to consider whether the *Casillan* sanctions alone can justify a circuit suspension.

Thus, Smith submits that for the reasons stated above, his suspension for challenging the Tenth Circuit's view represents a significant departure from the "accepted and usual course of judicial proceedings," necessitating review by this Court. S. Ct. R. 10.1(a).

B. Whether an Attorney May Be Suspended by a Circuit Court Until the Attorney Pays All Monetary Sanctions Assessed Against Him or Her, Where the Attorney Is Financially Unable to Pay Those Sanctions?

Smith is unable to pay the monetary sanctions that underlie his suspension. However, he will not be able to pay off those sanctions if he is denied the opportunity to engage in his livelihood, which the suspension itself prevents him from doing. He has negative net worth and no income aside from his law practice. App. at A116, A141-146. Given the recognized right of a lawyer to practice law if qualified, *see Baird v. State Bar of Arizona*, 401 U.S. 1, 8, 91 S. Ct. 702, 707 (1971); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39, 77 S. Ct. 752, 756 (1957), the unconstitutionality of certain wealth-based classifications, *see, e.g., Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780 (1971); *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S. Ct. 1079 (1966); *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814 (1963), and Smith's inability to pay the monetary sanctions that underlie the suspension, the current sanctions are open-ended, unsatisfiable, and improper under the

due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution. "In this context . . . the requirement of fee paying causes an 'invidious' discrimination [ ] that runs afoul of the Equal Protection Clause." *Harper v. Virginia Board of Election*, 383 U.S. at 668, 86 S. Ct. at 1082. Should attorneys who cannot pay monetary sanctions imposed against them be suspended indefinitely, perhaps permanently, whereas lawyers who become judgment debtors under identical circumstances, but who can afford to pay them, be returned to practice almost immediately? Is conditioning the duration of a circuit suspension of an attorney on payment of significant sums of money ever justified?

At the very least, the Tenth Circuit should have, but did not, consider his ability to comply with the underlying monetary sanctions prior to suspending him. *See United States v. Rylander*, 460 U.S. 752, 757, 103 S. Ct. 1548, 1552-53 (1983) (the court must consider present inability to comply with the order in question); *Maggio v. Zeitz*, 333 U.S. 56, 72-77, 68 S. Ct. 401, 409-12 (1948) (impossibility of performance constitutes a defense

to contempt); *see also Tinsley v. Mitchell*, 804 F.2d 1254, 1256 (D.C.Cir. 1986) (citing *Maggio v. Zeitz*). Even the Tenth Circuit has recognized that the ability of a lawyer to pay a sanction is an important consideration in determining the severity of the sanction, *see White v. General Motors Corporation, Inc.*, 908 F.2d 675, 684-85 (10th Cir. 1990), yet the Tenth Circuit did not apply, and continues to ignore, its own criterion by indefinitely suspending Smith.

C. Whether a Circuit Court's Denial of an Evidentiary Hearing Prior to Suspending an Attorney Constitutes an Abuse of Discretion or a Denial of Due Process?

Finally, Smith submits that additional errors, amounting to abuse of discretion and, ultimately, denial of due process, were committed by the Tenth Circuit in connection with the Disciplinary Panel's handling of this proceeding.

Following issuance of the Tenth Circuit's September 15, 1993 Order to Show Cause, *In re Smith*, No. 93-631, Order to Show Cause (10th Cir. September 15, 1993), App. at A5, Mr. Smith made a written request for an evidentiary hearing or

designation of a special master for purposes of conducting an evidentiary hearing, pursuant to 10th Cir. R. Addendum 3, §§ 4.3 & 8.1.[7] In requesting an evidentiary hearing, Mr. Smith was seeking an opportunity to demonstrate, by expert testimony and otherwise, that he did not have a full and fair opportunity to litigate sanctions issues in the underlying cases, and that the appeals were not frivolous. On October 22, 1993, that request was denied. Consequently, the Tenth Circuit never gave Smith a full and fair opportunity to litigate the underlying sanctions issues, or to demonstrate that the appeals were not frivolous.

Specifically, Smith contends that, as a result of the court's refusal to hold an evidentiary hearing following his request, he was unable either to present expert testimony and otherwise make a

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[7]Section 8.1 of Addendum 3 of the Tenth Circuit Rules provides, in part, that in a contested proceeding, "[i]f an attorney's response to an order to show cause specifically requests to be heard in person in defense or in mitigation, the Disciplinary Panel may set the matter for a hearing before a Special Master." Additionally, § 4.3 of the same rules provides that, in any matter referred to the court's Disciplinary Panel, the "Panel may designate a Special Master for purposes of conducting an evidentiary hearing." 10th Cir.R. Addendum 3, § 4.3.

proper record on the issue of whether the appeals in the underlying cases were frivolous, or to present the financial information necessary to show that he was financially unable to pay the underlying sanctions. Indeed, because the Tenth Circuit's own rules provide the opportunity, upon request by the attorney against whom discipline is being considered, for an evidentiary hearing or review before a special master, 10th. Cir. R. Addendum 3, § 8.1, Smith contends that the refusal to hold such a hearing amounts to an abuse of discretion resulting in a denial of due process.

Rather than hear Smith's explanations for bringing the underlying appeals, the Tenth Circuit, instead, relied on the "precedent" provided by those cases. In its November 29, 1993 Order suspending Smith, the Tenth Circuit stated that "[w]e cannot overrule the judgment of another panel of this court. We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court. [citations omitted]." App. at A1. Such reliance on and analysis of those cases, particularly as basis for discipline, is incorrect for two reasons.

First, "precedent" does not mean application of facts previously adjudicated in other proceedings. Rather, "precedent" involves the creation of legal principles - "[a]n adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law". *Black's Law Dictionary* 1059 (5th ed. 1979); *see also* 10th Cir. R. 36.1. Thus, the question of whether, and to what extent, these unpublished sanction decisions could be used against Smith invokes the related but distinct principle of nonmutual offensive collateral estoppel, which was not applied by the Tenth Circuit. *See, e.g., People v. Tucker*, 837 P.2d 1225, 1228 (Colo. 1992) (elements to apply for collateral estoppel purposes when using judicial determinations in disciplinary proceedings).

Second, the "precedents" relied upon by the Tenth Circuit for Smith's suspension were unpublished decisions of the Tenth Circuit. Reliance by the Tenth Circuit on such cases as binding precedent against Smith, without more, was contrary to 10th Cir. R. 36.3, which provided that "[u]npublished opinions and orders

and judgments of this court have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel." 10th. Cir. R. 36.3 (effective January 1, 1993).

Thus, Smith contends that the order of suspension in light of the court's refusal to hear evidence regarding and subsequent reliance on the underlying cases was an abuse of discretion and resulted in a denial of due process.

CONCLUSION

For any, or all, of these reasons, this petition for a writ of certiorari should be granted. An attorney should not be suspended by a circuit court for advancing a jurisdictional position fully embraced by other circuit courts, but which conflicts with that circuit's precedent. Contrary to Tenth Circuit precedent, circuit courts do or should, indeed, have jurisdiction to hear immediate appeals of attorney fee sanctions directed solely against counsel of record in the district court. Conditioning the duration of an attorney's circuit suspension on the payment of monetary sanctions

imposed by a district court, which are not yet ripe for review under applicable circuit precedent, amounts to an improper appellate prejudgment. A lawyer should not be suspended indefinitely when he cannot afford to pay monetary sanctions, the payment of which will end his suspension. Here the Tenth Circuit has acted here as prosecutor, fact finder, judge, appellate tribunal, sentencer and collection agent in a *sui generis* proceeding, without the benefit of ample precedent or frequently utilized procedures. Due process was not followed below because of the character of these proceedings, Smith's only recourse is before this Court. Accordingly, petitioner respectfully submits that he has demonstrated that there are "special and important reasons" for review by this Court, S. Ct. R. 10.1, that his only recourse is before this Court, and that his petition for writ of certiorari to the Tenth Circuit Court of Appeal should be granted.

Respectfully submitted,

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Telephone: (303) 796-2626

Attorneys for Petitioner

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

IN RE:
DAVID L. SMITH

Petitioner

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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ATTORNEYS FOR PETITIONER

INDEX TO APPENDIX

Page

In re Smith, No. 93-631, Order
(10th Cir. Nov. 29, 1993) A1

In re Smith, No. 93-631, Order to Show Cause
(10th Cir. September 15, 1993) A5

In re Smith, No. 93-631, Order
(10th Cir. January 3, 1994) A7

In re Smith, No. 93-631, Order
(10th Cir. January 25, 1994) A8

Sandlin v. Canady, No. 92-1169,
Order and Judgment
(10th Cir. April 27, 1993) A9

Dunkin v. Louisiana-Pacific Corp., No. 92-1230,
Brief on Jurisdictional Issue
(10th Cir. filed August 31, 1992) A13

Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230
and 92-1381, Order (10th Cir.
February 11, 1993) A31

Dunkin v. Louisiana-Pacific Corp., No. 92 N 243,
Partial Transcript of Hearing on
February 17, 1994 . . . . . A35

Casillan v. R.T.D., Nos. 92-1009 and 92-1039,
Order and Judgment
(10th Cir. January 15, 1993) A39

Casillan v. R.T.D., No. 93-1158,
Order and Judgment
(10th Cir. December 14, 1993) A63

Page

Deherrera v. Denver, No. 93-1070,
Brief on Jurisdictional Issue
(10th Cir. filed April 30, 1993) A67

Deherrera v. Denver, Nos. 93-1070 and 93-1139,
Order and Judgment (10th Cir.
September 3, 1993) A102

Deherrera v. Denver, Nos. 93-1070 and 93-1139,
Order to Show Cause (10th Cir.
February 20, 1994) A113

Deherrera v. Denver, Nos. 93-1070 and 93-1139,
Response to Order to Show Cause
(10th Cir. filed March 7, 1994) A116

In re Smith, United States District Court
for the District of Colorado,
Committee on Conduct, No. 93-DP-28,
Letter (December 8, 1993) A151

In re Smith, United States District Court
for the District of Colorado,
Committee on Conduct, No. 93-DP-28,
Letter (January 18, 1994) A153

In re Smith, United States District Court
for the District of Colorado,
Committee on Conduct, No. 93-DP-28,
Letter (January 26, 1994) A155

In re Smith, United States District Court
for the District of Colorado,
Committee on Conduct, No. 93-DP-28,
Notice of Hearing (January 26, 1994) A156

Page

Supreme Court of Colorado, Disciplinary Counsel,
Notice of Investigation
(December 15, 1993) A158

Supreme Court of Colorado, Disciplinary Counsel,
Notice of Assignment to Investigator
(December 17, 1993) A160

In re Smith, Order (Fed. Cir.
January 19, 1994) A161

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE:	)	
	)	No. 93-631
DAVID L. SMITH	)	

ORDER

(Filed November 29, 1993)

Before SEYMOUR, BALDOCK and BRORBY, Circuit Judges.

Respondent was ordered to show cause why he should not be fined, disbarred or otherwise disciplined for filing frivolous appeals in numbers 93-1070 and 93-1139, Deherrera v. Denver, after the entry of this court's orders in Sandlin v. Canaday (In re Canaday), No. 92-1169 (10th Cir. April 27, 1993) and Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993), cert. denied, 114 S.Ct. 87 (October 4, 1993) (No. 92-1994) and for filing a frivolous appeal in Casillan v. Regional Transportation District, Nos. 92-

1009 & 92-1039 (10th Cir. January 15, 1993). Respondent maintains the appeals were not frivolous. We disagree.

The appeals were found to be frivolous by the panels who decided them. We cannot overrule the judgment of another panel of this court. We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court. United States v. Killion, No. 92-3130, 1993 WL 408150 (10th Cir. October 13, 1993); United States v. Spedalieri, 910 F.2d 707, 710 n.3 (10th Cir. 1990) (a three-judge panel cannot overrule circuit precedent); United States v. Berryhill, 880 F.2d 275, 277 (10th Cir. 1989), cert. denied, 493 U.S. 1049 (1990).

Respondent filed a petition for certiorari in Dunkin. The question presented for review was,

> "Whether an order sanctioning counsel currently of record is immediately appealable under the collateral order exception rule established by this Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).
>
> Whether sanctions may be imposed against counsel for filing appeals warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law."

Petition for certiorari, attached to appellant's motion to recall and stay the mandate filed July 12, 1993, in Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993). Certiorari was denied without comment. Dunkin v. Louisiana-Pacific Corp., ___ U.S. ___, 114 S.Ct. 87 (October 4, 1993) (No. 92-1994).

At oral argument, respondent admitted that he has not paid any of the sanctions that have been imposed on him by this court or the district court. David L. Smith is suspended from the practice of law before this court until all sanctions are paid. He may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied.

The clerk shall provide a copy of this order to all courts before which Mr. Smith has been admitted to practice.

Entered for the court
PER CURIAM

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK
C404 UNITED STATES COURTHOUSE
DENVER, COLORADO 80294
(303) 844-3157

ROBERT L. HOECKER
CLERK

PATRICK FISHER
CHIEF DEPUTY

November 29, 1993

NOTIFICATION OF MAILING

Re: 93-631, IN RE: Smith v. -
Lower docket:

A COPY OF THE ATTACHED ORDER HAS BEEN PLACED IN THE UNITED STATES MAIL THIS DATE, ADDRESSED AS FOLLOWS:

Mr. David L. Smith
1630 Welton Street
Suite 300
Denver, CO 80202

/s/

DEPUTY CLERK

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE	)	
	)	No. 93-631
DAVID L. SMITH	)	

ORDER

Filed September 15, 1993

Before BALDOCK and BRORBY, Circuit Judges.

Within twenty days of the date of this order, David L. Smith shall show cause in writing why he should not be fined, disbarred or otherwise disciplined for his actions in numbers 93-1070 and 93-1139, Deherrera v. Denver after the entry of this court's orders in Sandlin v. Canaday (In re Canaday), No 92-1169 (10th Cir. April 27th, 1993) and Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993). The panel in Deherrera referred this matter to this Discipline Panel because the appeal and petition for writ of

mandamus were frivolous. In Casillan v. Regional Transportation District, Nos. 92-1009 & 93-1039 (10th Cir. January 15, 1993), the court also found the appeal to be frivolous. Filing a frivolous appeal is a ground for discipline because it is a violation of 10th Cir. R. 46.5.

The clerk shall provide Mr. Smith a copy of the court's Plan for Attorney Disciplinary Enforcement. A copy of the Plan is attached to this Order to Show Cause. Also attached are the panel's order and judgement in Deherrera and the order and judgement and order on motion for recusal in Casillan.

Entered for the Court

ROBERT L. HOECKER, Clerk

/s/

Patrick Fisher
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE:	)	
	)	No. 93-631
DAVID L. SMITH	)	

ORDER

Filed January 3, 1994

Before SEYMOUR, Chief Judge, MCKAY, LOGAN, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL AND KELLY, Circuit Judges

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Respondent's motion for stay of suspension and petition for rehearing are denied by the panel of judges before whom this proceeding was submitted.

Pursuant to Fed.R. App.P. 35 (b) the suggestion for rehearing in banc was circulated to the judges of the court in regular active service. No judge having called for a poll, the suggestion for rehearing en banc is also denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

/s/
PATRICK FISHER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE:	)	
	)	No. 93-631
DAVID L. SMITH	)	

ORDER

Filed January 25, 1994

Before SEYMOUR, Chief Judge, BALDOCK and BRORBY, Circuit Judges.

Respondent's motion for a stay of his suspension pending a petition for a writ of certiorari is denied. Chief Judge Seymour would grant the motion and so dissents from this order.

Entered for the Court

ROBERT L. HOECKER, Clerk

/s/

PATRICK FISHER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: DOUGLAS L. CANADY, also known as Douglas Lee Canady, also known as Doug Canady, individually and as officer, director & sole shareholder of Interior Services, Inc., a Colorado corporation, and joint venturer in Viaduct Associates, and Creative Partners, Colorado joint ventures,	)	
Debtor,	)	
GLEN K. SANDLIN,	)	
Plaintiff,	)	No. 92-1169 (D.C. No. 92-Z-313) (D. Colo.)
v.	)	
DOUGLAS L. CANADY,	)	
Defendant-Appellee,	)	
DAVID L. SMITH,	)	
Attorney-Appellant.	)	

ORDER AND JUDGMENT*

(Filed April 27, 1993)

Before TACHA and BALDOCK, Circuit Judges, and BROWN,** Senior District Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

This matter is before the court on appellant's petition for rehearing and request for rehearing in banc, challenging in part the court's jurisdiction to issue the order and judgment filed February

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansan, sitting by designation.

4, 1993. We agree that we lacked jurisdiction. We therefore vacate the order and judgment and dismiss this appeal.

"[A] sanction order against an attorney currently or record is not a final decision for purposes of . . . appeal where the underlying controversy remains unresolved." G.J.B. & Assoc., Inc. v. Singleton, 913 F.2d 824, 827 (10th Cir. 1990). Nor is such an order appealable under the exception to the final judgment rule for collateral orders set forth in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). G.J.B. & Assoc., 913 F.2d at 829. Rather, "counsel must await the conclusion of the underlying lawsuit and then appeal." Id.

This court dismissed an appeal from an order on the merits of the underlying claims because that order remanded the case for significant further proceedings and therefore did not dispose of the entire discrete controversy between the creditor and debtor. Sandlin v. Canady (In re Douglas Canady), No. 92-1100 (10th Cir. June 24, 1992). The underlying controversy remains unresolved. The order sanctioning appellant is not yet appealable.

Appellant requests that the court hold the appeal in abeyance for an unspecified length of time until the underlying claims are resolved. He cites no authority for allowing the court to do so. We deny this request.

The February 4, 1993 order and judgment is VACATED, and the appeal is DISMISSED.

Entered for the Court

Deanell Reece Tacha
Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 92-1230

GEANA J. DUNKIN,

Plaintiff-Appellant,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, and DOUGLAS EDDINS,

Defendants-Appellees.

MEMORANDUM BRIEF OF PLAINTIFF-APPELLANT AND HER ATTORNEY ON JURISDICTIONAL ISSUE AND SUGGESTION FOR HEARING EN BANC

Plaintiff-Appellant Geana J. Dunkin and her attorney, David L. Smith, hereby submit the following memorandum brief on the jurisdictional issue identified in the August 10, 1992 letter from the Clerk of the Court of Appeals to all counsel:

I. STATEMENT OF THE CASE

This case was filed in the United States District Court for the District of Colorado on February 7, 1992. Plaintiff-Appellant's complaint stated claims for relief pursuant to the

Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended by the Civil Rights Act of 1991; the Colorado Antidiscrimination Act of 1957, C.R.S. § 24-34-301 et seq.; and Colorado common law.

On July 9, 1992, the District Court held a hearing and announced its order granting Defendants-Appellees' motions for protective orders; imposing sanctions (including harsh verbal reprimands) against the Plaintiff-Appellant and/or her attorney for refusing to sign Defendants-Appellees' confidentiality agreement as a condition precedent to their inspection and copying of documents requested in their first request for production of documents to the Defendants-Appellees, and as a condition precedent to their taking the depositions of the Defendants-Appellees and other witnesses already scheduled to be taken under the stipulated scheduling and discovery order signed by the parties and the Court; and requiring the Plaintiff-Appellant to obtain approval of her depositions and other discovery requests from a United States Magistrate Judge as a

condition precedent to conducting any discovery in the case. In connection with the sanctions imposed against the Plaintiff-Appellant and her attorney, the District Court ordered the Defendants-Appellees to file their applications for attorney's fees by July 13, 1992, and set a hearing for July 16, 1992, at 6 a.m., to resolve any disputed matters relating to the fee applications.

On July 16, 1992, the District Court held a hearing on Defendants-Appellees' fee applications and announced its order awarding attorney's fees of $4,060.00 against Plaintiff-Appellant's attorney; requiring Plaintiff-Appellant's attorney to pay the Defendants-Appellees this sum on or before July 27, 1992; and denying Plaintiff-Appellant's attorney's request for a stay of execution on the award of attorney's fees pending appeal. The District Court then issued a written order awarding "an additional fee of $481.25 for defense counsel's actual attendance at the hearing on Thursday, July 16, 1992 ($175 per hour x 2.75 hours actual hearing time)," as well as a written order protecting confidential information and a written special order of reference to United States Magistrate Judge imposing burdensome

conditions on Plaintiff-Appellant's discovery and infringing on the First Amendment rights of the Plaintiff-Appellant and her attorney. Throughout the District Court's verbal and written orders, Plaintiff-Appellant's attorney was reprimanded and vilified in the harshest conceivable terms.

On July 27, 1992, the Plaintiff-Appellant and her attorney filed a notice of appeal of the District Court's July 16, 1992 order.

On July 28, 1992, the Defendants-Appellees filed their motions to dismiss with prejudice or, alternatively to condition production of documents upon payment of attorney's fees, and to show cause why David L. Smith should not be held in contempt of Court. The basis for these motions was Plaintiff-Appellant's attorney's failure to obey the District Court's July 16, 1992 order to pay $4,541.25 in attorney's fees to the Defendants-Appellees on or before July 27, 1992. These motions are currently pending before the District Court.

On August 6, 1992, the Plaintiff-Appellant and her attorney filed a docketing statement citing 28 U.S.C. § 1291

(appealable collateral orders) as the specific statutory basis for determining that the District Court's July 16, 1992 judgment or order is appealable, and listing the following issues to be raised on appeal:

1. Whether the District Court erred in granting Defendants' motions for protective orders and in imposing sanctions against the Plaintiff and her attorney.

2. Whether the District Court erred in awarding attorney's fees of $4,541.25 against Plaintiff's attorney.

3. Whether the District Court erred in denying, in part, "Plaintiff's Motion for Reconsideration, Motion to Compel and/or for Sanctions, and Certificate of Compliance With Local Rule 403G" filed on July 13, 1992.

4. Whether the District Court erred in denying the request for sanctions contained in "Plaintiff's Response to Motion for Approval of Attorney's Fees With Affidavit and Plaintiff's Request for Sanctions Pursuant to Fed.R.Civ.P. 11" filed on July 14, 1992.

5. Whether the District Court's demeanor, attitude, behavior, rulings, and orders demonstrated hostility and bias against the Plaintiff, her attorney, and her case, and created an environment in which the Defendants and their attorney, Cecil R. Hedger, are being permitted to engage in abusive discovery tactics, delaying tactics, harassment, and other misconduct.

On August 10, 1992, the Clerk of the Court of Appeals sent a letter to all counsel stating that "the court is considering summary dismissal of this appeal for lack of jurisdiction," and requiring the parties simultaneously to serve and file memorandum briefs in support of their respective positions on the following jurisdictional issue:

> Whether the order being appealed is appealable at this time? See: G.J.B. & Assoc., Inc. v. Singleton, 913 F.2d 824 (10th Cir. 1990).

II. ARGUMENT

In Singleton, the Tenth Circuit said:

> Mindful of Supreme Court precedent and our language in D & H Marketers, we join the First, Third and Fifth Circuits and hold that a sanction order against counsel currently of record is not appealable under the Cohen collateral order exception to the final judgment rule. [Footnote omitted.]

Id. at 829. However, neither the referenced Supreme Court precedent nor the referenced Tenth Circuit language in D & H Marketers mandates the holding in Singleton that a sanction order against counsel currently of record is not appealable under the Cohen collateral order exception to the final judgment rule.

Controlling precedent in the Third Circuit and in a majority of the circuits holds that a sanction order against counsel is appealable under the Cohen collateral order exception to the final judgment rule.

A. THE REFERENCED SUPREME COURT PRECEDENT DOES NOT MANDATE THE HOLDING IN SINGLETON THAT A SANCTION ORDER AGAINST COUNSEL CURRENTLY OF RECORD IS NOT APPEALABLE UNDER THE COHEN COLLATERAL ORDER EXCEPTION TO THE FINAL JUDGMENT RULE.

In Singleton, the Tenth Circuit said:

> Despite their general agreement on the interlocutory nature of a sanction order against counsel of record, the circuit courts are sharply divided on the question of whether such an order is immediately appealable as an exception to the "final decision" rule under the collateral order doctrine first announced in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). [Footnote omitted.] "To come within the 'small class' of decisions excepted from the final-judgment rule by Cohen, the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." Coopers Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978)(emphasis added). . . .

> Since Cohen, the Supreme Court has attempted to define when an order is "effectively unreviewable on appeal from a final judgment." In United States v. Ryan, 402 U.S. 530, 533, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971), the Court indicated an appeal of a collateral order is permissible only when the "denial of immediate review would render impossible any review whatsoever of an individual's claims. . . ." And in United States v. MacDonald, 435 U.S. 850, 860, 98 S.Ct. 1547, 1552-53, 56 L.Ed.2d 18 (1978), the Supreme Court described the third requirement of Cohen as involving "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial. . . ."

Id. at 827-28.

In determining whether an appeal of a collateral order is permissible, the referenced Supreme Court precedent requires an analysis of the facts of the case to determine whether the three-pronged test of Cohen has been met. The holding in Singleton, on the other hand, creates a flat rule that does not require an analysis of the facts of the case. It is therefore clear that the referenced Supreme Court precedent does not mandate the holding in Singleton that a sanction order against counsel currently of record is not appealable under the Cohen collateral order exception to the final judgment rule.

B. THE REFERENCED TENTH CIRCUIT LANGUAGE IN D & H MARKETERS DOES NOT MANDATE THE HOLDING IN SINGLETON THAT A SANCTION ORDER AGAINST COUNSEL CURRENTLY OF RECORD IS NOT APPEALABLE UNDER THE COHEN COLLATERAL ORDER EXCEPTION TO THE FINAL JUDGMENT RULE.

In Singleton, the Tenth Circuit said:

> The closest we have come to addressing the issue is our decision in D & H Marketers, Inc. v. Freedom Oil & Gas, Inc., 744 F.2d 1443 (10th Cir. 1984)(en banc). In that case, we recognized that Cohen and its progeny would not permit us to establish a broad rule permitting interlocutory appeals of sanction orders; accordingly, we held that a district court's sanction order defaulting some but not all the parties to the lawsuit was not appealable until termination of the entire matter. The en banc court noted: "Attorneys and parties will be fully aware that they must bear the burden of sanctions to the conclusion of the case and appeal on the merits of the fully adjudicated case . . . ." Id. at 1446 (emphasis added). [Footnote omitted.]

Id. at 828.

In determining whether an appeal of an interlocutory sanction order is permissible, the referenced Tenth Circuit language in D & H Marketers requires an analysis of the facts of the case to determine whether the three-pronged test of Cohen

has been met.[1] The holding in Singleton, on the other hand, creates a flat rule that does not require an analysis of the facts of the case. It is therefore clear that the referenced Tenth Circuit language in D & H Marketers does not mandate the holding in Singleton that a sanction order against counsel currently of record is not appealable under the Cohen collateral order exception to the final judgment rule.

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[1]In footnote 5 of Singleton, the Tenth Circuit said:

> In D & H Marketers, we limited our earlier decision in Ohio v. Arthur Anderson & Co., 570 F.2d 1370 (10th Cir.), cert. denied, 439 U.S. 833, 99 S.Ct. 114, 58 L.Ed.2d 129 (1978), to its facts. In Ohio, we held that a sanction order against a party was immediately appealable under Cohen. We later explained that in Ohio we were concerned with a sanction order which if complied with may have put the sanctioned party in violation of foreign law. If the sanction had been erroneously imposed and left until the conclusion of the case, we might have been unable to ameliorate the consequences on a later appeal resulting in irreparable harm to the appellant. D & H Marketers, 744 F.2d at 1446.

Id. at 828-29.

C. CONTROLLING PRECEDENT IN THE THIRD CIRCUIT HOLDS THAT A SANCTION ORDER AGAINST COUNSEL IS APPEALABLE UNDER THE COHEN COLLATERAL ORDER EXCEPTION TO THE FINAL JUDGMENT RULE.

In Singleton, the Tenth Circuit said:

> In denying an immediate appeal of attorney sanctions, however, the First, Third and Fifth Circuits have relied on the third requisite of the Cohen doctrine to hold that postponing the appeal would not cause the sanctioned party irreparable harm. In re Licht & Semonoff, 796 F.2d 564, 570-73 (1st Cir. 1986)(Rule 26(g) sanctions); Eastern Maico Distrib. Inc. v. Maico-Fahrzeugfabrik, 658 F.2d 944, 948-49 (3rd Cir. 1981)(Rule 37(a)(4) sanctions); Click v. Abilene Nat'l Bank, 822 F.2d 544, 545 (5th Cir. 1987)(Rule 11 sanctions).

Id. at 828. In so stating, the Tenth Circuit was apparently unaware of Eavenson Auchmuty & Greenwald v. Holtzman, 775 F.2d 535 (3rd Cir. 1985). In that case, the Court of Appeals for the Third Circuit explained the collateral order approach where the district court sanctioned plaintiff's attorney under Rule 11 for violating a court proscription contained in the leave to file an amended complaint. After being sanctioned, counsel promptly withdrew from the case and filed a timely appeal. The Court of Appeals held that it had appellate jurisdiction under the Cohen

collateral order rule because the facts in Eavenson met all three of the criteria necessary under Cohen.

The Eavenson court held that the finality element was met because the sanction order awarding attorney's fees was a conclusive determination of the sanctions issue. The court determined that the issue on appeal was collateral to the merits because the only question presented upon appeal was whether the attorney complied with the proscription contained in the leave to file an amended complaint. Finally, the court found that the issue was effectively unreviewable because the sanctioned party may be unable to appeal a final judgment, or at least be unaware of the judgment in order to file a timely appeal.

The Third Circuit described the potential problems for the appellant if appellate jurisdiction is denied:

> First, the possibility exists that appellant's former client may ultimately prevail on the merits, or settle the case; in either of those situations, it is not clear that appellant would be able to appeal from final judgment. Second, it is quite possible, even likely, that appellant . . . may be unaware that the suit has been terminated so as to be able to file a timely appeal. Thus, appellant might never be able to receive any appellate review of the sanctions order if he is denied that opportunity now.

The Court also based appellate jurisdiction on analogous cases involving civil contempt sanctions. The Court of Appeals held that like a non-party witness who can immediately appeal a contempt sanction, the non-party attorney who is accused of violating Rule 11 should be allowed an immediate appeal. "We conclude that appellant's position as a non-party to the underlying action has placed him in a predicament similar to that of the non-party witness who has been sanctioned for civil contempt, i.e., the challenged order is effectively unreviewable upon appeal from a final judgment."

D. CONTROLLING PRECEDENT IN A MAJORITY OF CIRCUITS HOLDS THAT A SANCTION ORDER AGAINST COUNSEL IS IMMEDIATELY APPEALABLE UNDER THE COHEN COLLATERAL ORDER EXCEPTION TO THE FINAL JUDGMENT RULE.

The Eavenson approach has been adopted by the Seventh Circuit, the Ninth Circuit, and the Eleventh Circuit. See Frazier v. Cast, 771 F.2d 259, 261-62 (7th Cir. 1985)(fee award imposed on attorney is appealable collateral order); TMF Tool Co. v. Muller, 913 F.2d 1185, 1189 (7th Cir. 1990)(referring to

conclusion of sanctions matters as final for appealability purposes); Riverhead Sav. Bank v. National Mortgage Equity Corp., 893 F.2d 1109, 1113 (9th Cir. 1990)("A sanctions order imposed solely on a non-party to pay attorney's fees and costs falls within the collateral order exception to the finality rule and is appealable immediately as a final order."); Aetna Life Ins. Co. v. Alla Medical Servs., Inc., 855 F.2d 1470, 1473 (9th Cir. 1988)("[S]anction orders issued solely against non-party attorneys are immediately appealable"); Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 n. 5 (9th Cir. 1987)("An order imposing sanctions upon counsel, a nonparty, is final and appealable by the person sanctioned upon imposition of the sanction."); Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 556 (9th Cir. 1986)(fee award against counsel is immediately appealable), cert. denied, 484 U.S. 822 (1987); DeSisto College, Inc. v. Line, 888 F.2d 755, 761-63 (11th Cir. 1989), cert. denied, 110 S.Ct. 2219 (1990)(fee award against counsel appealable); Ortho Pharmaceutical Corp., 847 F.2d 1512, 1515 (11th Cir. 1988)("When a Rule 11 sanction directs a non-party

(jointly and severally with parties to the action or alone) to pay immediately--that is, before entry of final judgment--significant attorney fees and costs, this court has jurisdiction to hear immediate appeal of the sanction order."). The D.C. Circuit also follows the reasoning expressed in Eavenson. See Westmoreland v. CBS, 770 F.2d 1168, 1172 (D.C. Cir. 1985)(fee award against a former counsel is appealable collateral order).

In Click v. Abilene Nat'l. Bank, 822 F.2d 544 (5th Cir. 1987), the Court of Appeals summarily rejected the collateral order approach. The court renounced the collateral order approach by stating that one of the criteria is not met. However, one might argue that this statement cannot apply to a non-party. As stated in Eavenson, there may never be a final judgment, and the non-party may miss the chance to appeal.

Click also cites analogous sanctions cases to support its argument. See In re Licht & Semonoff, 796 F.2d 564, 568-72 (1st Cir. 1986)(fee award under Rule 26(g) against attorney for abuse of discovery is nonappealable interlocutory order). In

contrast, the Eavenson case compares the Rule 11 case to other interlocutory orders and finds that, like those other orders, the Rule 11 order should be immediately appealable.

A more recent Fifth Circuit case shows some movement away from the strict rule announced in Click. In Markwell v. County of Bexar, the Fifth Circuit carved an exception to Click: "we believe that where an order assesses sanctions against an attorney who has withdrawn from representation at the time of the appeal, and immediate appeal of the sanction order will not impede the progress of the underlying litigation, an exception to the general policy set out in Click is warranted."

III. CONCLUSION

In the present case, the District Court's July 16, 1992 order conclusively determined the disputed question of sanctions, and resolved this important issue completely separate from the merits of the action. Since the sanction order required Plaintiff-Appellant's attorney to pay $4,541.25 in attorney's fees to the Defendants-Appellees on or before July 27, 1992, the order is effectively unreviewable on appeal from a final judgment. If the

Plaintiff-Appellant ultimately prevails on the merits, or if the case is settled, Plaintiff-Appellant's attorney might never be able to receive any appellate review of the sanction order if he is denied that opportunity now. For these reasons, the sanction order is appealable under the Cohen collateral order exception to the final judgment rule, and the holding in Singleton that a sanction order against counsel currently of record is not appealable under this exception should be overturned.

IV. SUGGESTION FOR HEARING EN BANC

I express a belief based on a reasoned and studied professional judgment that this appeal involves one or more questions of exceptional importance: whether the holding in Singleton that a sanction order against counsel currently of record is not appealable under the Cohen collateral order exception to the final judgment rule should be overturned.

Dated this 31st day of August, 1992.

Respectfully submitted,

/s/

David L. Smith
Attorney for Plaintiff-Appellant
1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 1992, a true and correct copy of the foregoing Memorandum Brief of Plaintiff-Appellant and Her Attorney and Suggestion for Hearing En Banc was placed in the United States mail, postage prepaid, addressed as follows:

Cecil R. Hedger, Esq.
HARDING & OGBORN
1200 Seventeenth Street
Suite 1000
Denver, Colorado 80202

/s/

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GEANA J. DUNKIN, Plaintiff - Appellant, v. LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINGS, Defendants - Appellees,	)	No. 92-1230
DAVID L. SMITH, Attorney - Appellant, GEANA J. DUNKIN, Plaintiff - Appellant, v. LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINGS, Defendants - Appellees.	)	No. 92-1381

ORDER

Filed: February 11, 1993

Before MOORE, TACHA, and BALDOCK, Circuit Judges

The captioned appeals are jurisdictionally defective because the orders being appealed are not appealable before the entry of final judgment.

Both appeals arise out of the same district court action. In appeal no. 92-1230, counsel for plaintiff and plaintiff appeal an order of the district court imposing sanctions on counsel for the plaintiff for violation of discovery orders. The order being appealed in No. 92-1381 imposed attorney fee sanctions on the plaintiff's counsel under Local Rule 602 C which provides that "[p]arties seeking or responding to a reconsideration of a magistrate's order should expect that attorney's frees will be awarded to the prevailing party on such review." No final judgment has been entered in the underlying action.

The law is well established in this circuit that an order sanctioning counsel currently of record is not appealable before entry of final judgment. "A sanction order against an attorney currently of record is not a final decision for purposes of § 1291 appeal where the underlying controversy remains unresolved." G.J.B. & Assoc. v. Singleton, 913 F.2d 824, 827 (10th Cir. 1990). Nor are the orders appealable under the Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) collateral order exception to the final judgment rule. 913 F.2d at 829.

The defendants seek the imposition of sanctions pursuant to 28 U.S.C. § 1927, Fed. R. App. P. 38, and 10th Cir. R. 46.5. The plaintiff and her counsel have filed responses to the requests. See Braley v. Campbell, 832 F.2d 1504, 1514-1515 (10th Cir. 1987).

Under Fed. R. App. P. 38 "just damages and single for double costs" may be awarded when "an appeal is frivolous." An appeal is frivolous when "the result is obvious, or the appellant's arguments of error are wholly without merit."

Braley v. Campbell, 832 F.2d at 1510 (citations omitted).

Sanctions are appropriate in this case. Counsel for the plaintiff not only pursued appeal no. 92-1230 after he was informed by this court of a jurisdiction defect but also filed another appeal with the identical defect. As noted above, the law is clear and well settled in this circuit regarding the appealability of these orders.

Appellee's Motion to Strike the Response of Plaintiff-Appellant and Her Attorney is denied as moot.

These appeals are DISMISSED and the cases REMANDED for a determination of the reasonable attorney fees for each defendant for defending these appeals. Those fees shall be imposed against counsel for the plaintiff, but not the plaintiff. See Braley v. Campbell, 832 F.2d at 1512-1513.

Entered for the Court
ROBERT L. HOECKER, Clerk

By: /s/
Ellen Rich Reiter
Deputy Clerk/Appeals Expediter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

GEANA J. DUNKIN,	)
	)
Plaintiff	)
	)
vs.	)
	)
LOUISIANA-PACIFIC CORPORATION,	)
	)
Defendant	)

HEARING - AWARD OF ATTORNEYS FEES AND
PRETRIAL CONFERENCE
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE EDWARD W. NOTTINGHAM, U.S. District Judge for the District of Colorado, beginning at 6:11 a.m. on the 17th day of February, 1994, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

For David Smith, Esq.	Phillip Figa, Esq. 5251 DTC Parkway Englewood, Colorado
For the Defendants:	Cecil Raymond Hedger, Esq. Harding & Ogborn 1200 - 17th Street #1000 Denver, Colorado 80202

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

If Mr. Smith could make a mockery of these proceedings by turning the circus into a side show by the collateral litigation that he has generated in this case, then there would be no justice in this case. So I'm awarding fees in the amount of $17,506.50. I'm awarding costs in the amount of $579.33.

Now, have the fees and costs from my previous sanctions been paid yet, Mr. Hedger?

MR. HEDGER: No, they have not, Your Honor.

THE COURT: Well, I'll reorder them paid in the for what it's worth category. How an attorney of law can continue to defy the authority of courts is just beyond me.

Court's in recess.

MR. HEDGER: Your Honor, just one ancillary matter in light of your observation of trying to--I don't need to take up the Court's time. Thank you, Your Honor.

THE COURT: All right.

(6:28 a.m. - Whereupon, the hearing was concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

February 23, 1994

/s/ Mary C. Chevalier
Federal Reporting Service, Inc.
17454 E. Asbury Place
Aurora, Colorado 80013
(303) 751-2777

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN CASILLAN, Plaintiff-Appellant, v. REGIONAL TRANSPORTATION DISTRICT; AMALGAMATED TRANSIT UNION, Local 1001; MICHAEL GARCIA; RICHARD BAUMAN; ROBERT GARSIDE; ED RHATICAN; PETE PEREA; BERNIE SNYDER; GEORGE STANKO; and GREGG FISHER, Defendants-Appellees.	)	Nos. 92-1009 and 92-1039 (D.C. No. 90-S-1722) (Dist. Colo.)

ORDER AND JUDGMENT*
FILED JANUARY 15, 1993

Before McKAY, SETH and MOORE, Circuit Judges

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*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(e); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Plaintiff John Casillan appeals the district court's dismissal of his civil rights complaint against the Regional Transportation District (RTD), Amalgamated Transit Union (ATU), and various named individual defendants. In a separate case, plaintiff's counsel also appeals the imposition of sanctions against him. We combine both cases for disposition and affirm.

This case arises out of a series of work-related conflicts between plaintiff, three of his four co-workers and defendant Stanko, which resulted in plaintiff's termination for refusal to undergo psychiatric evaluation. Plaintiff is a United States citizen of Hispanic/Filipino origin. He was employed as a facilities maintenance technician by defendant RTD for fifteen years, spanning from November 24, 1974, until his termination on

November 10, 1989. At the time of his termination, plaintiff and his co-workers were supervised by defendant Stanko.

The ongoing tension between plaintiff and three co-workers, which included a fist fight between plaintiff and a co-worker in 1987, and an alleged attempt by plaintiff to run over another co-worker with a golf cart on September 12, 1989, are extensively documented in an arbitrator's decision made a part of the record before us. Because of the golf cart incident, plaintiff was suspended for two days and issued disciplinary notices for conduct unbecoming an employee and use or threat of force. According to defendant Stanko, when plaintiff was suspended, plaintiff made inappropriate comments about Mr. Stanko's health and threatened to have him fired. Plaintiff subsequently asked for a medical pass and did not return to work until October 16, 1989.[1]

Between October 16 and 19, plaintiff allegedly threatened to "get" one of his co-workers, accused defendant Stanko of setting

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[1]During his time off, plaintiff maintains he filed complaints with the EEOC and Colorado Civil Rights Commission, alleging national origin discrimination. The existence and/or outcome of these complaints is unknown.

him up, and attempted to frighten another co-worker by driving his van toward the man. On October 19, 1989, the three co-workers told defendant Stanko they were unwilling to work with plaintiff because they were afraid for their own safety, given plaintiff's hostile actions and their on-the-job exposure to high voltage. Defendant Stanko sent the men back to work and contacted defendant Fisher, the senior labor relations representative.

After meeting with plaintiff, defendant Stanko, plaintiff's co-workers, and others, defendant Fisher asked plaintiff to undergo a psychiatric evaluation. Plaintiff refused. Mr. Fisher then sent plaintiff home on paid sick leave pending psychiatric evaluation and threatened to terminate plaintiff's sick leave benefits if plaintiff failed to undergo evaluation.

Plaintiff's sick leave benefits expired on October 24 but were extended through November 10 by defendant Fisher, who again asked plaintiff to reconsider psychiatric evaluation. On November 6, plaintiff filed a national origin discrimination complaint with the EEOC, alleging he had been falsely accused (by

defendant Stanko) of attempting to run down a co-worker in a golf cart.[2]

On November 8, defendant Fisher informed plaintiff he would be terminated if he continued to refuse evaluation. Plaintiff was terminated on November 10 due to "continuing voluntary unavailability for work" and given full benefits and pay through that date.

Because plaintiff was a member of defendant ATU and his employment was governed by a collective bargaining agreement between ATU and RTD, plaintiff first challenged his termination in a grievance/arbitration proceeding in which he was represented by defendant ATU. At the July 1990 arbitration hearing, plaintiff testified at length about the harassment he allegedly had experienced at the hands of his co-workers. Plaintiff claimed his co-workers instigated the various encounters and conflicts at issue. Plaintiff also accused defendant Stanko of singling him out for less

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[2]Once again, the outcome of the EEOC complaint is unknown.

desirable jobs. Finally, plaintiff testified he had filed EEOC charges on a number of occasions.

In response, RTD contended it had the right to require plaintiff to undergo psychiatric evaluation under the Management Rights and Sick Leave provisions of the Collective Bargaining Agreement. RTD also introduced evidence about its past practice of requiring medical or psychiatric evaluations where warranted, noting that defendant ATU (which at that time represented plaintiff) could select a second doctor if it disagreed with the results of the initial psychiatric exam. In the alternative, RTD suggested plaintiff could be evaluated under the Employee Assistance Program, a program for employees who represent less of an immediate threat.

The arbitrator concluded plaintiff's termination differed "dramatically" from a normal discharge case in two important respects. First, plaintiff's "termination" in effect constituted an indefinite suspension because RTD had agreed to put plaintiff back to work at the facility of his choice if plaintiff agreed to a psychiatric evaluation and the results were favorable. Second,

RTD had a contractual right to require plaintiff to undergo "medical examination" (including psychiatric evaluation, which the arbitrator found indistinguishable from physical examination) based on the provisions of the collective bargaining agreement and past practice. The arbitrator determined RTD had a reasonable basis for requiring the evaluation, given the number of complaints against plaintiff and RTD's need to take action to solve the obvious problems between plaintiff and his co-workers. Finding he could "only commend" RTD for the manner in which it handled plaintiff's case, the arbitrator ordered ATU and RTD to establish an "appropriate method" for psychiatric evaluation.

Despite the arbitrator's findings, plaintiff never submitted to psychiatric evaluation. Instead, on September 27, 1990, plaintiff filed the instant action against RTD, ATU, and several individual defendants,[3] alleging violation of his civil rights under 42 U.S.C.

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[3]In addition to defendants Stanko and Fisher, plaintiff sued six members of RTD management. With the exception of defendant Bauman, who was RTD acting general manager when plaintiff was terminated, it is unclear from plaintiff's complaint or the briefs submitted on appeal exactly what positions the other named defendants held or in what capacity

§§ 1981 and 1983; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000; § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185; and the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. On December 10, 1991, after more than a year of procedural skirmishes and two ineffectual amendments to plaintiff's original complaint, the district court granted defendants' Fed. R. Civ. P. 12(b)(6) motions to dismiss plaintiff's complaint for failure to state claims upon which relief could be granted.

Plaintiff argues that under Lessman v. McCormick, 591 F.2d 605, 611 (10th Cir. 1979) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)), "and the legal authorities cited therein," he is not required to "set out in detail the facts upon which he bases his claim." To the contrary, plaintiff maintains his "short and plain" statement of claims gave defendants fair notice of the basis for charges against them, thus satisfying Lessman's loose pleading requirements. Plaintiff argues the district court erred in concluding

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they were acting when they allegedly violated plaintiff's civil rights.

otherwise or, alternately, in not giving him the opportunity to amend the complaint again under Fed. R. Civ. P. 15(a).

The sufficiency of a complaint is a question of law which this court reviews de novo, applying "the same scrutiny" as the trial court. Ayala v. Joy Mfg. Co., 877 F.2d 846, 847 (10th Cir. 1989) (quoting Morgan v. City of Rawlins, 792 F.2d 975, 978 (10th Cir. 1986) (citations omitted)). Thus, in considering whether the district court erred in dismissing plaintiff's complaint, "[a]ll well-pleaded facts, as distinguished from conclusory allegations, must be taken as true." Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir. 1984) (citation omitted) (emphasis added). Dismissal is proper "only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief." Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, 927 F.2d 1111, 1115 (10th Cir. 1991) (citation omitted).

Plaintiff's reliance upon Lessman is misplaced because the case is distinguishable in two important respects. First, though the complaint in Lessman failed to allege plaintiff "was unlawfully deprived of her money or property," the complaint did state

specific facts supporting a claim of false arrest and false imprisonment under color of state law. Lessman, 591 F.2d at 609. Second, Lessman's false imprisonment claim, which asserted a violation of the constitutional right to be free from bodily restraint, is a recognized § 1983 cause of action.

In contrast, Mr. Casillan's complaint is devoid of any facts from which this court could surmise that a constitutionally protected liberty or property right was violated. Based upon plaintiff's refusal to submit to psychiatric examination, the complaint identifies only the "reasonable expectation of privacy with respect to his own thoughts and mental processes" as a constitutional predicate for his action.

Plaintiff has cited no cases in which such a right is recognized, especially where an employment agreement specifically grants an employer the right to request such an examination. Here, the contract governing plaintiff's employment explicitly stated, "the Employer [RTD] reserves the right to request that the employee submit to an examination by a medical doctor of the Employer's choosing and at the Employer's expense."

Plaintiff's complaint, moreover, is full of unsubstantiated, generalized factual allegations which do not give defendants any notice of the grounds upon which plaintiff's claims are based. The most glaring example is plaintiff's repeated charge that defendant ATU "aided, abetted and participated in" the deprivation of his constitutional rights. Nowhere does the complaint state what specific actions defendant ATU supposedly took to deprive plaintiff of constitutionally protected rights. Only in plaintiff's appeal brief do we discover that defendant ATU allegedly "failed to adequately represent him in the grievance and arbitration process." This contention was not raised in the district court. In short, plaintiff has confused vague conclusory generalizations for the statement of facts necessary to state a claim.

As the district court noted in its comprehensive, well-reasoned order dismissing plaintiff's complaint, all the claims contained in the complaint are disposable due to their legal inadequacy. For instance, plaintiff's § 1983 claim fails to satisfy either of the statute's two elements because the complaint does not explain how defendants acted under color of law or which of

plaintiff's constitutionally protected rights were violated. Because the elements of a conspiracy claim under § 1983 are the same as those for a regular § 1983 claim, Norton v. Liddel, 620 F.2d 1375, 1378-79 (10th Cir. 1980), plaintiff's § 1983 conspiracy claim is plagued by the same problems. Plaintiff's § 1981 claim is without merit because § 1981 does not apply to the kind of on-the-job deprivation which plaintiff alleges.[4] Plaintiff's Title VII claim also fails because plaintiff alleges no facts to support a causal connection between his EEOC claims and his termination or retaliatory motives on the part of named defendants. Finally, plaintiff's privacy, property, and liberty claims under the First,

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[4]As the Supreme Court noted in Patterson v. McLean Credit Union, 491 U.S. 164, 177 (1989), "the right to make contracts [under § 1981] does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including . . . imposition of discriminatory working conditions" or harassment by a supervisor. Nor does the right to enforce contracts "extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights." Id. at 177-78. Here, the arbitration hearing and instant case illustrate that no defendant has impaired plaintiff's "right of access to legal process."

Fourth, Fifth, Ninth, and Fourteenth Amendments are not actionable because the complaint fails to state specific constitutional rights which were violated or factual support for those claims. The one right enumerated by plaintiff, the "reasonable expectation of privacy with respect to his own thoughts and mental processes," is not of constitutional import.[5]

Thus, although "[t]he Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim,"[6] clearly the presumption is not without limits. As we stated in Bryan v. Stillwater Bd. of Realtors, 578 F.2d 1319, 1321 (10th Cir. 1977) (citations omitted), "allegations of conclusions or of opinions are not sufficient when no facts are alleged by way of the statement of the claim."

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[5]The constitutional right of privacy is not to be equated with the common law right recognized by state tort law . . . . [O]nly the most intimate phases of personal life have been held to be constitutionally protected." NcNally v. Pulitzer Publishing Co., 532 F.2d 69, 76 (8th Cir.), cert. denied, 429 U.S. 855 (1976) (citations omitted).

[6]Morgan, 792 F.2d at 978 (quoting Auster Oil & Gas, Inc. v. Stream, 764 F.2d 381, 386 (5th Cir. 1985)).

Plaintiff had three opportunities to file a complaint containing facts sufficient to support his claims. Each of his amended complaints, however, was virtually identical to the original complaint -- devoid of sufficient facts and overly replete with conclusory allegations. Under Fed. R. Civ. P. 15(a), plaintiff was entitled to amend his complaint "once as a matter of course." The district court generously allowed plaintiff to amend a second time, but plaintiff failed to take advantage of the opportunity to tighten his legal arguments or present facts supporting his claims. Allowing plaintiff to amend yet again would serve no legitimate purpose.

Plaintiff claims the district court's failure to lift a stay of discovery[7] before dismissing his complaint deprived him of "the opportunity to determine through the discovery process whether the evidence existed to establish a conspiracy." To support his argument, plaintiff again cites Lessman, 591 F.2d at 611, this time

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[7]Discovery was stayed on March 29, 1991, pending evidentiary hearing on and resolution of plaintiff's motion to disqualify defendant ATU's counsel.

for the proposition that "parties should not be thrown out of court before being given an opportunity through . . . [discovery] to ascertain whether the linkage they think may exist actually does."

As a general rule, "[d]iscovery rulings are within the broad discretion of the trial court." Willner v. Budig, 848 F.2d 1032, 1035-36 (10th Cir. 1988), cert. denied, 488 U.S. 1031 (1989) (citation omitted); Stil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507, 1514 (10th Cir. 1990) (citation omitted). "[A] trial court's decision [on discovery matters] will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." United States v. Ortiz, 804 F.2d 1161, 1164 n.2 (10th Cir. 1986).

Plaintiff's conspiracy claim fails to state the specific conspiratorial actions allegedly taken by defendants or the particular constitutional rights allegedly violated by those actions. Indeed, in the same conclusory fashion which plagues the entire complaint, paragraph 1 merely alleges defendants "have engaged in a conspiracy with each other and with unknown third persons for

the purpose of depriving, either directly or indirectly, the Plaintiff of his rights . . . ." Paragraph 2 proceeds along a similarly vague course, only stating that "[o]ne or more persons engaged in the conspiracy did, or caused to be done, an act or acts in furtherance of the object of such conspiracy [i.e., plaintiff's termination], whereby the Plaintiff was injured in his person or property." Plaintiff does not assert what act or acts were committed or by whom, nor does he assert which constitutional rights were violated as a consequence of concerted action.[8]

Plaintiff's reliance on Lessman for the "right" to discovery is misplaced for two reasons. First, Lessman involved conspiracy charges under § 1985, not § 1983. Arguably, Lessman's

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[8]Moreover, any such claim could not lie against either RTD or ATU because the doctrine of respondeat superior does not apply to § 1983 claims. Monell v. Dept. of Social Servs., 436 U.S. 658, 691 (1978). "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Id. at 694.

observation regarding the need for discovery in conspiracy cases[9] is confined to § 1985 conspiracy claims, given that statute's stringent intent/motive requirement. Second, Lessman does not mandate discovery whenever a plaintiff alleges conspiracy. Indeed, in Lessman we affirmed the dismissal of the plaintiff's conspiracy claim, finding the plaintiff failed to show she was "the object of a class-based invidiously discriminatory animus." Id. at 608.

Thus, although plaintiff claims he should have been allowed to conduct discovery and proceed with his conspiracy claim, he was not entitled to discovery as a matter of law before the district court ruled on defendants' motions to dismiss. One need only examine plaintiff's fact-less complaint to understand the uselessness of further discovery. The district court's dismissal of plaintiff's complaint without discovery was entirely appropriate.

These conclusions render moot the remaining issues raised in Case No. 92-1009. We have, nonetheless, reviewed those

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[9]Specifically, Lessman, 591 F.2d at 611, stated that "[i]n many cases of conspiracy essential information can only be produced through discovery."

issues and find them frivolous. Disqualification of ATU's counsel was not required because counsel had no previous attorney-client relationship with plaintiff. Smith v. Whatcott, 757 F.2d 1098, 1100 (10th Cir. 1985); Peterson v. Kennedy, 771 F.2d 1244, 1258 (9th Cir. 1985), cert. denied 475 U.S. 1122 (1986). The district court did not err by dismissing the complaint without ruling on plaintiff's motions for reconsideration. The first motion was filed notwithstanding the court had ruled in plaintiff's favor.[10] Plaintiff's second motion to reconsider stated the magistrate "was without legal authority" to impose sanctions because under Local Rule 602 C of the United States District Court for the District of Colorado only the district court could do so. The second motion also challenged the granting of defendant RTD's motion for protective order on the grounds that RTD "failed to meet its initial burden" of proving its personnel files were privileged and plaintiff was

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[10]Specifically, plaintiff's counsel argued that the magistrate's order was clearly erroneous and contrary to law because it "deprived Plaintiff's counsel of the opportunity to expunge the record of false and defamatory statements" allegedly made by defendant RTD and its counsel.

denied the opportunity to demonstrate the relevancy of the files to his claims. Plaintiff's third motion to reconsider challenged the district court's April 5, 1991 order striking his Rule 56(f) affidavit because he should have been allowed to respond to defendants' motions for summary judgment/dismissal under Rule 56(e) and file a Rule 56(f) affidavit. Plaintiff's arguments in support of his contentions on these rulings are frivolous.

Plaintiff argues the district court erred in adopting the order of the magistrate judge granting defendant RTD's motion for protective order and imposed sanctions against plaintiff's counsel for filing an "unwarranted and frivolous" motion to reconsider. The sanctioned motion is the first motion previously discussed in which plaintiff contended the magistrate judge's order was clearly erroneous and contrary to law, even though the magistrate judge ruled in plaintiff's favor. In the order awarding attorney fees, the magistrate judge noted that fees were justified on two grounds: "Not only did the court rule in plaintiff's favor because it agreed with plaintiff that defendant failed to attach supporting documentation, but plaintiff has failed to cite any authority in

support of his assertion that the court abused its discretion." On appeal, plaintiff again maintains the magistrate judge's order imposing fees was clearly erroneous and contrary to law and the district court erred in reinstating fees without ever ruling on the merits of plaintiff's motion for reconsideration.

In a joint answer brief, defendants argue that there was no factual basis for plaintiff's motion to reconsider. Rather, "[i]f plaintiff's counsel had reasonably investigated, he would have read the August 30, 1991 order and found it to be in his favor." Moreover, "if he had reasonably investigated the law, he would not have found any authority in support of his positions in the motion."

The standard of review for sanctions or award of attorney fees is whether the district court abused its discretion. Coffey v. Healthtrust, Inc., 955 F.2d 1388, 1393 (10th Cir. 1992) (citations omitted); Smith v. Freeman, 921 F.2d 1120, 1122 (10th Cir. 1990) (citations omitted). Although the parties consume a significant amount of energy arguing over the propriety of sanctions, the record indicates no Federal Rule of Civil Procedure 11 sanctions were ordered. Rather, the magistrate judge's November 29, 1991

order imposing "sanctions . . . for the attorney fees required by defendants to respond to plaintiff's Motion for Reconsideration" in reality was nothing more than a mislabeled, though nonetheless justified, award of attorney fees under Local Rule 602 C. That rule expressly states: "[p]arties seeking or responding to a reconsideration of a magistrate's order should expect that attorney fees will be awarded to the prevailing party on such review" (emphasis added).[11] Thus, Local Rule 602 C clearly authorized the magistrate judge's "sanctions."[12]

There is, however, a legitimate sanctions issue before this court. Defendant RTD asks this court to "award RTD costs and attorney fees pursuant to 42 U.S.C. § 1988, Fed. R. Civ. P. 11, Fed. R. Civ. P. 56(g), as well as such other and further relief this

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[11]Though plaintiff asks this court to strike the attorney fee provision of Local Rule 602 C, he offers no persuasive reason why this court should do so.

[12]The magistrate judge's reference to the award as "sanctions" and later inaccurate references by the parties and district court to the award as "attorney fees and costs" may have contributed to the parties' confusion over this relatively uncomplicated matter.

Court deems fair and equitable." The named defendants also ask for attorney fees and costs relating to the appeal.

Under Fed. R. App. P. 38, "just damages and single or double costs" may be awarded when "an appeal is frivolous." An appeal is frivolous "if the result is obvious or if the appellant's arguments wholly lack merit." Willner, 848 F.2d at 1036. In the instant case, there are a number of grounds on which to conclude plaintiff's arguments on appeal are frivolous and to impose sanctions.

It is difficult to believe that the many legal misrepresentations and unsubstantiated, conclusory allegations contained in plaintiff's pleadings are unintentional. A typical example is counsel's argument that 28 U.S.C. § 636(b)(1)(A) requires a district court to reconsider a magistrate judge's order despite the statute's plain statement that a district judge "may reconsider" such an order (emphasis added).

In addition, defendants present compelling arguments for sanctions. For instance, defendant ATU notes that "to this day" it "has no idea what it is alleged to have done." Similarly, the

named defendants claim they were never given proper notice of the specific actions they allegedly took to deprive plaintiff of his constitutional rights.[13] In their joint answer, defendants maintain that if an appeal of sanctions "is itself frivolous, Rule 38 gives appellate courts ample authority to award expenses." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 407 (1990) (a case involving Rule 11 sanctions).

Defendants are entitled to some form of compensation for having been dragged so pointlessly through the courts for the past two years. This action has been groundless from the day of filing, and the agonies visited upon the defending parties and their counsel by plaintiff's attorney and his relentless aggressiveness cannot be allowed to go unanswered. Attorneys who confuse misguided zeal and the pursuit of unfounded legal theories for championing the cause of justice must recognize there is a price for their efforts. The cause of justice is not an invitation to batter blameless parties,

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[13]Having reviewed the pleadings, we too are puzzled over who some of the named defendants are or what role they may have played in terminating plaintiff.

nor is it a substitute for proper investigation and grounding of legal proceedings. When the lack of preparation rises to the level of marked indifference to or ignorance of the law, as it has in this case, justice demands compensation.

The judgment of the district court is **AFFIRMED**, and the case is remanded for a determination of reasonable attorney fees for each defendant for defending this appeal. Those fees shall be assessed against counsel for plaintiff, but not plaintiff. Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987).

Entered for the Court

John P. Moore
Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN CASILLAN, Plaintiff, v. REGIONAL TRANSPORTATION DISTRICT; AMALGAMATED TRANSIT UNION, LOCAL 1001; MICHAEL GARCIA; RICHARD BAUMAN; ROBERT GARSIDE; ED RHATICAN; PETE PEREA; BERNIE SNYDER; GEORGE STANKO; GREGG FISHER, Defendants-Appellees, DAVID L. SMITH, Attorney-Appellant.	)	No. 93-1158 (D.C. No. 90-S-1722) (D. Colo.)

ORDER AND JUDGMENT*

(Filed December 14, 1993)

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Before ANDERSON and EBEL, Circuit Judges, and WINDER,* District Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

This proceeding arises out of an unsuccessful civil rights action litigated by appellant David L. Smith as counsel for plaintiff John Casillan. On two prior appeals, this court affirmed the district court's dismissal of the action and its imposition of sanctions. An en banc petition for rehearing and motion to disqualify the author of the adverse order and judgment were also denied. As a sanction for pursuing the frivolous appeals, this court held plaintiff's counsel accountable for attorneys' fees incurred by

* Honorable David K. Winder, Chief Judge, United States District Court for the District of Utah, sitting by designation.

the opposing parties, and remanded the matter to the district court for a determination of the appropriate amount. On remand, the district court awarded $4,525,00, $3,269.00, and $6,687.50 to the attorneys representing three sets of defendants-appellees. This appeal followed.

Having reviewed the briefs and materials submitted by the parties, we conclude that most of the issues raised by Mr. Smith are plainly lacking in merit and warrant no further comment. The remaining matters consists of conclusory challenges to the hours and hourly rate deemed reasonable by the district court for computing defense counsel's fees. We review the latter solely for an abuse of discretion. Aquinaga v. United Food & Commercial Workers International Union, 993 F.2d 1480, 1481 (10th Cir. 1993), of which we find no indication here.

Appellees have requested the imposition of an appellate sanction against Mr. Smith for pursuing a frivolous appeal. Unlike a number of other matters brought before this court by Mr. Smith,[1]

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[1] We note that Mr. Smith has been sanctioned in the past and is currently the subject of a stringent

this appeal, while meritless, is not in our opinion so bereft of legal or factual bases as to warrant sanctions.

The order of the United States District Court for the District of Colorado is AFFIRMED. Amalgamated Transit Union's motion to adopt the answer brief filed by its co-appellees is GRANTED, and the Regional Transportation District's motions to supplement its supplemental appendix with a full hearing transcript and to compel Mr. Smith to order and pay for the same is DENIED as moot in light of our disposition of the appeal.

Entered for the Court

Stephen H. Anderson
Circuit Judge

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disciplinary order issued by another panel of this court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 93-1070

KELLY J. DEHERRERA,

Plaintiff-Appellant-Petitioner,

v.

CITY AND COUNTY OF DENVER, acting by and through its Board of Water Commissioners, W. THOMAS RICHARDS, individually and in his official capacity as Superintendent of Maintenance of the Denver Water Department, and CHARLES CHAPMAN, individually and in his official capacity as Transportation Foreman of the Denver Water Department,

Defendants-Appellees-Respondents,

and

THE HONORABLE LEWIS T. BABCOCK, United States District Judge for the District of Colorado,

Respondent.

MEMORANDUM BRIEF ON JURISDICTIONAL ISSUE AND PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

Plaintiff Kelly J. DeHerrera and her attorney, David L. Smith, hereby file the following Memorandum Brief on

Jurisdictional Issue and Petition for Writ of Mandamus or Prohibition:

I. STATEMENT OF THE CASE

This case was filed in the United States District Court for the District of Colorado on December 21, 1990, United States District Judge Lewis T. Babcock presiding. Plaintiff's Second Amended Complaint alleges claims against Defendants City and County of Denver, W. Thomas Richards, and Charles Chapman under the Equal Pay Act of 1963, 29 U.S.C. § 206(d); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; and 42 U.S.C. § 1983. Discovery cutoff was August 9, 1991.

On October 10, 1991, Judge Babcock entered the following Order:

> In this case, plaintiff's counsel has filed numerous motions to reconsider, some of which are, and have been, based on unsubstantiated or conclusory claims of counsel.[1] In the future, I will presume that if a motion for reconsideration is based on unsubstantiated or conclusory claims of counsel, then it is unreasonable and vexatious under 28 U.S.C. § 1927. Similarly, any future

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[1]Plaintiff's attorney denies this charge by Judge Babcock.

> motions for reconsideration must explain why the Magistrate Judge's order is clearly erroneous or contrary to law, not simply why the order is incorrect.

On December 3, 1991, the Plaintiff filed Plaintiff's Motion to Place Case on Jury Trial Calendar requesting Judge Babcock to place the case on the jury trial calendar in accordance with his August 27, 1991 Order deferring submission of the pretrial order until a date within 30 days after Chief United States Magistrate Judge Donald E. Abram's ruling on Plaintiff's (June 21, 1991) Motion to Add Individual Defendants became conclusive. This ruling became conclusive on November 1, 1991.

On December 4, 1991, Judge Babcock entered his Minute Order denying Plaintiff's Motion to Place Case on Jury Trial Calendar without making any statement of the reasons for the denial and without making any provision for placing the case on the jury trial calendar.

On January 27, 1992, Plaintiff's attorney filed Plaintiff's Motion for Reconsideration requesting Judge Babcock to reconsider the Order entered by Chief Magistrate Judge Abram

on January 13, 1992 denying the Motion to Strike filed by the Plaintiff on November 15, 1991. Plaintiff's attorney explained that based on the arguments made in Plaintiff's Motion to Strike, Chief Magistrate Judge Abram's January 13, 1992 Order was clearly erroneous-and contrary to law under 28 U.S.C. § 636 and Rule 602C of the Local Rules of Practice of the United States District Court for the District of Colorado.

On January 29, 1992, Plaintiff's attorney filed Plaintiff's Motion for Reconsideration and Request for Permission to Submit Transcript requesting Judge Babcock to reconsider the Order entered by Chief Magistrate Judge Abram on January 24, 1992 denying the Motion to Disqualify filed by the Plaintiff on November 22, 1991. Plaintiff's attorney explained that based on the arguments made in Plaintiff's Motion to Disqualify, and on the transcript of the December 12, 1991 hearing, Chief Magistrate Judge Abram's January 24, 1992 Order was clearly erroneous and contrary to law under 28 U.S.C. § 636 and Local Rule 602C.

On March 13, 1992, Plaintiff's attorney filed Plaintiff's Motion for Reconsideration, Request for Ruling on Motion for Protective Order, and Request for Stay requesting Judge Babcock to reconsider the rulings made by Chief Magistrate Judge Abram on March 6, 1992. Plaintiff's attorney explained that based on the arguments made in Plaintiff's Motion for Reconsideration, Request for Ruling on Motion for Protective Order, and Request for Stay, Chief Magistrate Judge Abram's March 6, 1992 rulings were clearly erroneous and contrary to law under 28 U.S.C. § 636 and Local Rule 602C.

On March 26, 1992, Plaintiff's attorney filed Plaintiff's Motion for Reconsideration requesting Judge Babcock to reconsider the Order entered by Chief Magistrate Judge Abram on March 16, 1992 imposing attorney fees sanctions of $2,287.50 against Plaintiff's attorney and in favor of Defendant City and County of Denver pursuant to Fed. R. Civ. P. 11. Plaintiff's attorney explained that based on the arguments made in previous motions and objections, and on the transcript of the December 12, 1991 hearing, Chief Magistrate Judge Abram's

March 16, 1992 Order was clearly erroneous and contrary to law under 28 U.S.C. § 636 and Local Rule 602C.

On April 29, 1992, the Plaintiff filed Plaintiff's (Second) Motion to Place Case on Jury Trial Calendar requesting Judge Babcock to place the case on the jury trial calendar in accordance with the statement made by Chief Magistrate Judge Abram at the March 6, 1992 pretrial conference that notice of a jury trial date would be mailed to the parties within "ten days to two weeks."

On May 13, 1992, Judge Babcock held a trial setting conference and denied Plaintiff's (Second) Motion to Place Case on Jury Trial Calendar without making any clear statement of the reasons for the denial, but promising to rule on pending motions and place the case on the jury trial calendar. Judge Babcock ordered counsel for the parties to file no further pleadings until he had ruled on pending motions.

On December 8, 1992, the Plaintiff filed her Petition for Writ of Mandamus or Prohibition to the United States Court of Appeals for the Tenth Circuit requesting the Court of Appeals to

enter an order requiring Judge Babcock to fulfill his promise to rule on pending motions and place the case on the jury trial calendar.

On December 28, 1992, a panel of the Tenth Circuit entered its Order denying Plaintiff's (December 8, 1992) Petition for Writ of Mandamus or Prohibition on the ground that "petitioner has failed to establish a clear and indisputable right to a writ of mandamus."

On January 25, 1993, Judge Babcock entered his Order denying Plaintiff's January 27, 1992, January 29, 1992, March 13, 1992, and March 26, 1992 motions for reconsideration. Judge Babcock based his January 25, 1993 Order on the conclusion that Plaintiff's attorney failed to explain why the Chief Magistrate Judge's orders denying the motions and objections underlying Plaintiff's motions for reconsideration were clearly erroneous or contrary to law under 28 U.S.C. § 636, Local Rule 602C, and Judge Babcock's October 10, 1991 Order. Judge Babcock entered his January 25, 1993 Order without addressing the arguments made in the motions and

objections underlying Plaintiff's motions for reconsideration. Judge Babcock gave the Plaintiff ten days to respond to Defendants' motion for attorney fees, and gave the Defendants ten days to reply.

On January 29, 1993, the Plaintiff filed Plaintiff's Response to Defendants' Motion for Attorney Fees arguing that Plaintiff's motions for reconsideration were neither vexatious nor unreasonable under 28 U.S.C. § 1927; that Defendants' motions for attorney fees were based on an erroneous view of the law under Fed. R. Civ. P. 11 and 28 U.S.C. § 1927, and on a clearly erroneous assessment of the evidence; and that Judge Babcock would necessarily abuse his discretion if he based his ruling on the arguments made in Defendants' motion for attorney fees. The Plaintiff requested Judge Babcock to deny Defendants' motion for attorney fees, and to set Plaintiff's case for a jury trial on the merits.

On February 4, 1993, Judge Babcock entered his Order granting Defendants' motion for attorney fees. Judge Babcock based his February 4, 1993 Order on the conclusion that

Plaintiff's attorney failed to explain why the Chief Magistrate Judge's orders denying the motions and objections underlying Plaintiff's motions for reconsideration were clearly erroneous or contrary to law under 28 U.S.C. § 636, Local Rule 602C, and Judge Babcock's October 10, 1991 Order. Judge Babcock entered his February 4, 1993 Order without addressing the arguments made in the motions and objections underlying Plaintiff's motions for reconsideration. Judge Babcock gave the Defendants until February 12, 1993 "to file an affidavit of the costs and attorney fees it incurred in connection with DeHerrera's January 27, 1992, January 29, 1992, March 13, 1992, and March 26, 1992 reconsideration motions," and gave Plaintiff's attorney until February 19, 1993 to "respond to defendants' attorney fee affidavits."

On or about February 11, 1993, the Defendants filed Defendants' Verified Motion for Attorneys Fees and Affidavit in Support Thereof requesting Judge Babcock to order Plaintiff's attorney to pay $11,512.50 to Defendant City and County of Denver for attorney fees reasonably incurred in connection with

Plaintiff's motions for reconsideration. The Defendants specifically stated that "no reimbursement is sought for costs." As usual, Defendants' unscrupulous attorney, Henry V. S. Hall, directed numerous false, defamatory, and inappropriate comments at Plaintiff's attorney.

On February 12, 1993, the Plaintiff filed Plaintiff's Motion for Reconsideration of Judge Babcock's February 4, 1993 Order.

Judge Babcock immediately entered his February 12, 1993 Order denying Plaintiff's Motion for Reconsideration without addressing the arguments made in Plaintiff's Motion for Reconsideration, and without setting Plaintiff's case for a jury trial.

On February 19, 1993, the Plaintiff and her attorney filed their Response to Defendants' Verified Motion for Attorney Fees and Affidavit in Support Thereof.

On February 23, 1993, the Tenth Circuit entered its Order denying Plaintiff's (January 6, 1993) Petition for Rehearing and Suggestion for Rehearing En Banc requesting the

Tenth Circuit to rehear the panel's (December 28, 1992) Order denying Plaintiff's (December 8, 1992) Petition for Writ of Mandamus or Prohibition on the ground that "the original disposition was correct."

On March 1, 1993, Judge Babcock entered his Order requiring that "by March 8, 1993 DeHerrera's counsel shall pay defendants $7,627.50 as sanctions under 28 U.S.C. § 1927 in accordance with my February 4, 1993 order," and that "by March 8, 1993 DeHerrera's counsel shall pay defendants $2,287.50 in accordance with the magistrate judge's March 16, 1992 order."

On March 8, 1993, the Plaintiff and her attorney filed their Notice of Appeal to the United States Court of Appeals for the Tenth Circuit from the orders entered by Judge Babcock on January 25, 1993, February 4, 1993, February 12, 1993, and March 1, 1993, and from the judgment entered by the Clerk of the United States District Court for the District of Colorado on March 2, 1993.

On or about March 15, 1993, Defendants' attorney, Henry V. S. Hall, filed Defendants' Motion for Issuance of Citation requesting Judge Babcock to issue a citation to Plaintiff's attorney ordering him to show cause why he should not be held in contempt of Court and "punished appropriately" for disobeying Judge Babcock's March 1, 1993 Order requiring Plaintiff's attorney to pay $9,915.00 to the Defendants by March 8, 1993. This motion is currently pending before Judge Babcock.

On April 2, 1993, the Tenth Circuit ordered counsel for both sides to simultaneously serve and file memorandum briefs in support of their respective positions on the following jurisdictional issue: "Whether the district court orders and judgment assessing monetary sanctions against Plaintiff's counsel are final or immediately appealable where a final judgment has not been entered in the underlying district court action initiated by Plaintiff DeHerrera?"

II. ARGUMENT

A. PLAINTIFF'S POSITION ON JURISDICTIONAL ISSUE

In G.J.B. & Assoc., Inc. v. Singleton, 913 F.2d 824, 827-28 (10th Cir. 1990), the Tenth Circuit said:

> Despite their general agreement on the interlocutory nature of a sanction order against counsel of record, the circuit courts are sharply divided on the question of whether such an order is immediately appealable as an exception to the "final decision" rule under the collateral order doctrine first announced in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). [Footnote omitted.] "To come within the 'small class' of decisions excepted from the final-judgment rule by Cohen, the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." Coopers Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978)(emphasis added). . . .
>
> Since Cohen, the Supreme Court has attempted to define when an order is "effectively unreviewable on appeal from a final judgment." In United States v. Ryan, 402 U.S. 530, 533, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971), the Court indicated an appeal of a collateral order is permissible only when the "denial of immediate review would render impossible any review whatsoever of an individual's claims. . . ." And in United States v. MacDonald, 435 U.S. 850, 860, 98 S.Ct. 1547, 1552-53, 56 L.Ed.2d 18 (1978), the Supreme Court described the third requirement of Cohen as involving "an asserted

> right the legal and practical value of which would be destroyed if it were not vindicated before trial. . . ."

In the present case, Judge Babcock has entered orders imposing sanctions totalling $9,915.00 against Plaintiff's attorney, and requiring Plaintiff's attorney to pay the sanctions imposed against him to the Defendants within seven days after entry of the orders. Under these circumstances, Judge Babcock's orders conclusively determined the disputed question of sanctions, and resolved this important issue completely separate from the merits of the action. If the Plaintiff ultimately prevails on the merits, or if the case is settled, Plaintiff's attorney might never be able to receive any appellate review of Judge Babcock's orders if he is denied that opportunity now. Judge Babcock's orders are therefore effectively unreviewable on appeal from a final judgment, and are clearly appealable under the collateral order exception to the final judgment rule set forth in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). See, e.g., Eavenson Auchmuty & Greenwald v. Holtzman, 775 F.2d 535 (3rd Cir.

1985)(leading case); Frazier v. Cast, 771 F.2d 259, 261-62 (7th Cir. 1985)(fee award imposed on attorney is appealable collateral order); TMF Tool Co. v. Muller, 913 F.2d 1185, 1189 (7th Cir. 1990)(referring to conclusion of sanctions matters as final for appealability purposes); Riverhead Sav. Bank v. National Mortgage Equity Corp., 893 F.2d 1109, 1113 (9th Cir. 1990)("A sanctions order imposed solely on a non-party to pay attorney's fees and costs falls within the collateral order exception to the finality rule and is appealable immediately as a final order."); Aetna Life Ins. Co. v. Alla Medical Servs., Inc., 855 F.2d 1470, 1473 (9th Cir. 1988)("[S]anction orders issued solely against non-party attorneys are immediately appealable"); Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 n. 5 (9th Cir. 1987)("An order imposing sanctions upon counsel, a nonparty, is final and appealable by the person sanctioned upon imposition of the sanction."); Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 556 (9th Cir. 1986)(fee award against counsel is immediately appealable), cert. denied, 484 U.S. 822 (1987); DeSisto College, Inc. v. Line, 888 F.2d 755, 761-63

(11th Cir. 1989), cert. denied, 110 S.Ct. 2219 (1990)(fee award against counsel appealable); Ortho Pharmaceutical Corp., 847 F.2d 1512, 1515 (11th Cir. 1988)("When a Rule 11 sanction directs a non-party (jointly and severally with parties to the action or alone) to pay immediately--that is, before entry of final judgment--significant attorney fees and costs, this court has jurisdiction to hear immediate appeal of the sanction order."); Westmoreland v. CBS, 770 F.2d 1168, 1172 (D.C. Cir. 1985)(fee award against a former counsel is appealable collateral order); but see Click v. Abilene Nat'l. Bank, 822 F.2d 544 (5th Cir. 1987)(rejecting collateral order approach).

In G.J.B. & Assoc., Inc. v. Singleton, 913 F.2d at 829, the Tenth Circuit said:

> We reject any notion that an attorney risks losing the right to appeal if the parties settle or elect not to appeal from the final judgment.

However, even if Plaintiff-Appellant's attorney has not lost the right to appeal in the present case, he has lost the $9,915.00 that Judge Babcock has ordered him to pay to the Defendants. This is a far cry from the $370.00 in sanctions imposed against the

attorney in G.J.B. & Assoc., Inc. v. Singleton. It simply cannot be the rule that an order imposing sanctions against counsel currently of record--regardless of the lack of justification for the sanctions, the amount of the sanctions, or the time for payment of the sanctions--cannot be appealed before entry of final judgment.

B. ISSUES PRESENTED FOR REVIEW ON PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

Whether Judge Babcock abused his discretion by entering orders imposing sanctions totalling $9,915.00 against Plaintiff's attorney, and requiring Plaintiff's attorney to pay the sanctions imposed against him to the Defendants within seven days after entry of the orders.

Whether Judge Babcock abused his discretion by continuing to refuse to fulfill his promise to rule on pending motions and place Plaintiff's sex discrimination case on the jury trial calendar.

C. RELIEF SOUGHT ON PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

The Plaintiff and her attorney request the Court of Appeals to review and vacate the orders entered by Judge Babcock imposing sanctions totalling $9,915.00 against Plaintiff's attorney, and requiring Plaintiff's attorney to pay the sanctions imposed against him to the Defendants within seven days after entry of the orders. The Plaintiff and her attorney also request the Court of Appeals to review the continuing refusal by Judge Babcock to fulfill his promise to rule on pending motions and place Plaintiff's sex discrimination case on the jury trial calendar, and to require Judge Babcock to place the case on the jury trial calendar on a date certain within 90 days.

D. REASONS WHY THE WRIT SHOULD ISSUE

In Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990), the Supreme Court made the following ruling with respect to the standard to be applied in reviewing all aspects of a district court's Rule 11 determination:

> [A]n appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination. A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.

In Braley v. Campbell, 832 F.2d 1504, 1512 (10th Cir. 1987), the Tenth Circuit made the following ruling with respect to the standard to be applied under 28 U.S.C. § 1927:

> We believe the proper standard under either Rule 38 or § 1927 is that excess costs, expenses, or attorney's fees are imposable against an attorney personally for conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.

In White v. General Motors Corp., Inc., 908 F.2d 675, 680 (10th Cir. 1990), the Tenth Circuit made the following ruling with respect to the standard to be applied under Fed. R. Civ. P. 11:

> This circuit has adopted the view that an attorney's actions must be objectively reasonable in order to avoid Rule 11 sanctions. Adamson v. Bowen, 855 F.2d 668, 673 (10th Cir. 1988). A good faith belief in the merit of an argument is not sufficient; the attorney's belief must also be in accord with what a reasonable, competent attorney would believe under the circumstances. Id. In addition, it is not sufficient for an offending attorney to allege that a competent attorney could have made a

> colorable claim based on the facts and law at issue; the offending attorney must actually present a colorable claim. See Calloway v. Marvel Entertainment Group, 854 F.2d 1452, 1470 (2d Cir. 1988)(focus on whether an objectively reasonable basis for claim 'was demonstrated') rev'd in part on other grounds ___ U.S. __ , 110 S.Ct. 456, 107 L.Ed.2d 438 (1988).

In Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991), the Tenth Circuit confirmed previous rulings on the issue of waiver of appellate review of magistrate (judge's) orders:

> Although we plainly have jurisdiction over this appeal, see 28 U.S.C. § 1291, 2253, 2255, we have adopted a firm waiver rule when a party fails to object to the findings and recommendations of the magistrate. Niehaus v. Kansas Bar Ass'n, 793 F.2d 1159, 1164-65 (10th Cir. 1986); Boyd Motors, Inc. v. Employers Ins., 880 F.2d 270, 271 (10th Cir. 1989). See also Thomas v. Arn, 474 U.S. 140, 146, 106 S.Ct. 466, 470, 88 L.Ed.2d 435 (1985). Our waiver rule provides that the failure to make timely objection to the magistrate's findings or recommendations waives appellate review of both factual and legal questions. [Footnote omitted.]

Under 28 U.S.C. § 636 and Rule 602C of the Local Rules of Practice of the United States District Court for the District of Colorado, a party seeking review of a magistrate (judge's) order must file a motion for reconsideration with the clerk of the district court on or before ten (10) days after the date of the

order. The standard of review to be applied by the district judge is whether the magistrate (judge's) order is clearly erroneous or contrary to law. A factual finding is clearly erroneous "'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Anderson v. City of Bessemer, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)).

In the present case, Judge Babcock has entered orders imposing sanctions in the form of attorney fees against Plaintiff's attorney on the ground that Plaintiff's attorney has failed to explain why Chief Magistrate Judge Abram's orders denying the motions and objections underlying Plaintiff's motions for reconsideration were clearly erroneous or contrary to law under 28 U.S.C. § 636, Local Rule 602C, and Judge Babcock's October 10, 1991 Order. However, Plaintiff's attorney has explained that based on the arguments made in the motions and

objections underlying Plaintiff's motions for reconsideration, Chief Magistrate Judge Abram's orders denying these motions and objections were clearly erroneous or contrary to law under 28 U.S.C. § 636 and Local Rule 602C. Since these arguments show that mistakes were committed by Chief Magistrate Judge Abram in his orders denying the motions and objections underlying Plaintiff's motions for reconsideration, the Plaintiff has explained why these orders were clearly erroneous or contrary to law under 28 U.S.C. § 636 and Local Rule 602C, and Judge Babcock has abused his discretion by entering orders imposing monetary sanctions in the form of attorney fees against Plaintiff's attorney. By entering his January 25, 1993, February 4, 1993, February 12, 1993, and March 1, 1993 orders without addressing the arguments made in the motions and objections underlying Plaintiff's motions for reconsideration, Judge Babcock has failed to perform the duty of an Article III judge to decide the case or controversy before the Court.

As is clear from the arguments made in the motions and objections underlying Plaintiff's motions for reconsideration,

Plaintiff's attorney has presented colorable claims based on the facts and law at issue, and viewed objectively, the conduct of Plaintiff's attorney manifests neither intentional nor reckless disregard of his duty to comply with Judge Babcock's lawful orders. Under these circumstances, Plaintiff's motions for reconsideration were neither vexatious nor unreasonable under 28 U.S.C. § 1927, and Judge Babcock has abused his discretion by basing his October 10, 1991, January 25, 1993, February 4, 1993, February 12, 1993, and March 1, 1993 orders on an erroneous view of the law, and on a clearly erroneous assessment of the evidence.

Judge Babcock's imposition of immediately payable monetary sanctions against Plaintiff's attorney for filing motions for reconsideration necessary to preserve his client's right to appellate review, while denying repeated requests to set Plaintiff's sex discrimination case for a jury trial, demonstrates a bias against the Plaintiff, her case, and her attorney. Other federal court practitioners are not subjected to this mistreatment at the hands of Judge Babcock. Plaintiff's attorney is being

subjected to this mistreatment to chill, or altogether freeze, his zealous advocacy of federal civil rights lawsuits federal court, thus depriving his clients of an advocate and him of a livelihood. Judge Babcock's insistence that Plaintiff's attorney has stepped beyond the bounds of the law in this case is pure pettifoggery designed to cover up Judge Babcock's true motivation.

In White v. General Motors Corp., Inc., 908 F.2d at 683-84, the Tenth Circuit made the following ruling with respect to the reasonableness of the fee request:

> We believe that a district court must expressly consider at least the following circumstances when determining the monetary sanctions appropriate in a given case, all of which serve as limitations on the amount assessed:
>
> 1. Reasonableness (lodestar) calculation. Because the sanction is generally to pay the opposing party's "reasonable expenses . . . including a reasonable attorney's fee," Fed.R.Civ.P. 11, incurred because of the improper behavior, determination of this amount is the usual first step. The plain language of the rule requires that the court independently analyze the reasonableness of the requested fees and expenses. Doering, 857 F.2d at 195. The injured party has a duty to mitigate costs by not overstaffing, overresearching or overdiscovering clearly meritless claims. E.g., Napier, 855 F.2d at 1092-94; Thomas, 836 F.2d at 878-81. In evaluating the reasonableness of the fee request, the district court should

> consider that the very frivolousness of the claim is what justifies the sanctions.

In the present case, Judge Babcock has entered orders imposing sanctions totalling $9,915.00 against Plaintiff's attorney for filing motions for reconsideration of Chief Magistrate Judge Abram's orders. However, if Plaintiff's motions for reconsideration were so clearly meritless, the Defendants have overstaffed and overresearched clearly meritless claims, thus failing to mitigate costs.

In White v. General Motors Corp., Inc., 908 F.2d at 684, the Tenth Circuit made the following ruling with respect to the standards applicable to a fee request:

> On remand we direct the district court to reexamine GM's fee request using standards similar to those we set out in Ramos v. Lamm, 713 F.2d 546, 553-55 (10th Cir. 1983).

In Ramos v. Lamm, 713 F.2d at 552-53, the Tenth Circuit said:

> "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley v. Eckerhart, ___ U.S. ___, 103 S.Ct. at 1939.

> The first step in calculating fee awards is to determine the number of hours reasonably spent by counsel for the party seeking the fees. [Footnote omitted.] In the future, district judges in this Circuit will inform lawyers that if they intend to seek attorney's fees under § 1988, they must keep meticulous, contemporaneous time records to present to the court upon request. These records must reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks--for example, how many hours were spent researching, how many interviewing the client, how many drafting the complaint, and so on. [Footnote omitted.]

See also Local Rule 105A of the Local Rules of Practice of the United States District Court for the District of Colorado. In the present case, Defendants' attorney has failed to submit meticulous, contemporaneous time records to Judge Babcock reflecting all hours for which compensation is requested and how those hours were allotted to specific tasks.

In Ramos v. Lamm, 713 F.2d at 555, the Tenth Circuit also said:

> The first step in setting a rate of compensation for the hours reasonably expended is to determine what lawyers of comparable skill and experience practicing in the area in which the litigation occurs would charge for their time. [Footnote omitted.]

In this connection, the burden is on the party making the fee request to show what lawyers of comparable skill and experience practicing in the area in which the litigation occurs would charge for their time for the type of work involved. Id.; Lucero v. City of Trinidad, 815 F.2d 1384, 1385-86 (10th Cir. 1987). In the present case, the Defendants have failed to meet their burden of proving their attorneys' reasonable hourly rates.

In White v. General Motors Corp., Inc., 908 F.2d 684, the Tenth Circuit made the following ruling with respect to the purpose of sanctions:

> 2. Minimum to deter. As we have already stated, the primary purpose of sanctions is to deter attorney and litigant misconduct, not to compensate the opposing party for its costs in defending a frivolous suit. It is particularly inappropriate to use sanctions as a means of driving certain attorneys out of practice. Such decisions are properly made by those charged with handling attorney disbarment and are generally accompanied by specific due process provisions to protect the rights of the attorney in question. Doering, 857 F.2d at 196 & n. 4. We agree with the Third Circuit that the amount of sanctions is appropriate only when it is the "minimum that will serve to adequately deter the undesirable behavior." Id. at 194 (quoting Eastway, 637 F.Supp. at 565) (emphasis in Circuit opinion); see also Note, A Uniform Approach to Rule 11 Sanctions, 97 Yale L.J. 901, 912-14 (1988) (stressing importance of optimal

> rather than maximum deterrence in the imposition of Rule 11 sanctions). Thus, the limit of any sanction award should be that amount reasonably necessary to deter the wrongdoer. E.g., Doering, 857 F.2d at 195-96.

In the present case, Judge Babcock has imposed sanctions against Plaintiff's attorney in an amount sufficient to drive Plaintiff's attorney out of civil rights practice without regard to any consideration of the amount reasonably necessary to deter any undesirable behavior.

In White v. General Motors, Inc., 908 F.2d at 685, the Tenth Circuit made the following ruling with respect to other factors to be considered in imposing sanctions:

> 4. Other factors. In addition, the court may consider factors such as the offending party's history, experience, and ability, the severity of the violation, the degree to which malice or bad faith contributed to the violation, the risk of chilling the type of litigation involved, and other factors as deemed appropriate in individual circumstances. See ABA Standards at 236-37.

In the present case, imposing monetary sanctions of $9,915.00 against Plaintiff's attorney risks chilling, or altogether freezing, his zealous advocacy of federal civil rights lawsuits in federal court.

In White v. General Motors Corp., Inc., 908 F.2d at 685, the Tenth Circuit made the following ruling with respect to joint and several liability:

> Sanctions must be appropriate in amount and levied upon the person responsible for the violation. Chevron, U.S.A., Inc. v. Hand, 763 F.2d 1184, 1187 (10th Cir. 1985). We agree with those circuits that have expressed the view that the sanctioning of a party requires specific findings that the party was aware of the wrongdoing. Calloway, 854 F.2d at 1474-75; Donaldson v. Clark, 819 F.2d 1551, 1560 (11th Cir. 1987) (en banc). In the instant case, the trial court appears to have assessed joint and several liability without considering relative fault. . . . Therefore, on remand the court should make more specific findings regarding who bears the fault for the various actions warranting sanctions.

In the present case, Judge Babcock made the following finding in his March 1, 1993 Order regarding who bears the fault for the various actions warranting sanctions:

> Finally, DeHerrera's counsel contends that fees are not imposable because I never fixed blame between DeHerrera and her counsel for the filing of the unreasonable and vexatious reconsideration motions. I never addressed this contention because I considered it meritless. Nevertheless, it warrants brief attention to ensure a complete record. Counsel apparently contends that DeHerrera was responsible for the filing of these reconsideration motions. DeHerrera's January 27, 1992, January 29, 1992, March 13, 1992, and March 26, 1992 reconsideration motions pertained to magistrate judge

> rulings on discovery issues and disqualification of counsel. These magistrate judge orders raised legal issues, the significance of which only a lawyer could understand. I find that DeHerrera was not insisting that her counsel file these reconsideration motions. Instead, I find that DeHerrera's counsel took it upon himself to file these reconsideration motions. This finding is consistent with DeHerrera's counsel's insistence that these motions were justified by zealous advocacy. Advocacy relates to counsel's conduct. DeHerrera's counsel, therefore, cannot seriously argue that DeHerrera was responsible for the filing of these unreasonable, vexatious reconsideration motions. My February 4, 1993 order is amended to the extent it does not reflect that DeHerrera's counsel, not DeHerrera, is responsible for filing the unreasonable and vexatious January 27, 1992, January 29, 1992, March 13, 1992, and March 26, 1992 reconsideration motions.

However, the fact that Judge Babcock made a finding of this type does not make the finding true or mean the finding is based on anything other than pure speculation. Nothing has been done in this case that was not the product of joint decision-making between the Plaintiff and her attorney, including the filing of the four motions for reconsideration for which Judge Babcock has imposed sanctions against Plaintiff's attorney.

In White v. General Motors Corp., Inc., 908 F.2d at 686, the Tenth Circuit made the following ruling with respect to the amount of detail required in an attorney fee request:

> We believe . . . that an adequate opportunity to respond to an attorney's fee request requires that the persons to be sanctioned be provided enough detail concerning the basis of the requested fees to permit an intelligent analysis. The affidavit upon which the court relied in this case was insufficient because, although it broke down the fees by total hours and rates per lawyer and by category, it did not permit plaintiffs to ascertain the reasonableness of GM's staffing decisions. III R. tab 135. For instance, we note that as many as three attorneys or others represented GM at particular depositions. This information may seem burdensome to provide, but absent a hearing in which cross-examination is possible, we do not see how plaintiff's could challenge the request except in general terms on the basis of the attorney fee information provided in the instant case. We hold, therefore, that a separate hearing is not necessary to accord plaintiffs due process, but on remand the court should insure that plaintiffs receive enough detail to respond intelligently in writing to the reasonableness of the requested fees.

In the present case, the "affidavit" submitted by the Defendants does not include enough detail on Defendants' staffing and other decisions to permit the Plaintiff to respond intelligently in writing to the reasonableness of the requested fees.

On the basis of the foregoing reasons, Judge Babcock has grossly abused his discretion and power by entering his orders imposing sanctions totalling $9,915.00 against Plaintiff's attorney, and requiring Plaintiff's attorney to pay the sanctions imposed against him to the Defendants within seven days after entry of the orders.

With respect to Judge Babcock's continuing refusal to fulfill his promise to rule on pending motions and place Plaintiff's sex discrimination case on the jury trial calendar, Fed. R. Civ. P. 40 provides as follows:

> The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.

In the present case, Judge Babcock has failed to articulate any legitimate, nondiscriminatory reason for continuing to refuse to fulfill his promise to rule on pending motions and place 2Plaintiff's sex discrimination case on the jury trial calendar, even though more than 20 months have passed since the August

9, 1991 discovery cutoff date. Under these circumstances, Judge Babcock has abused his discretion under Fed. R. Civ. P. 40; the Plaintiff is being deprived of her Seventh Amendment right to a jury trial; and the Plaintiff has established a clear and indisputable right to a writ of mandamus or prohibition under Johnson v. Rogers, 917 F.2d 1283, 1285 (10th Cir. 1990).

E. PARTS OF RECORD SUBMITTED

Attached hereto and incorporated herein by reference for all purposes are copies of the following parts of the record that may be essential to an understanding of the matters set forth in this Memorandum Brief on Jurisdictional Issue and Petition for Writ of Mandamus or Prohibition:

1. Exhibit 1 - Plaintiff's (January 27, 1992) Motion for Reconsideration;

2. Exhibit 2 - Plaintiff's (January 29, 1992) Motion for Reconsideration and Request for Permission to Submit Transcript;

3. Exhibit 3 - Plaintiff's (March 13, 1992) Motion for Reconsideration, Request for Ruling on Motion for Protective Order, and Request for Stay;

4. Exhibit 4 - Plaintiff's (March 26, 1992) Motion for Reconsideration;

5. Exhibit 5 - Reporter's transcript of May 13, 1992 trial setting conference;

6. Exhibit 6 - Defendants' (February 11, 1993) Verified Motion for Attorneys Fees and Affidavit in Support Thereof;

Dated this 30th day of April, 1993.

Respectfully submitted,

/s/

David L. Smith
Attorney for Plaintiff
1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 1993, true and correct copies of the foregoing Memorandum Brief on Jurisdictional Issue and Petition for Writ of Mandamus or Prohibition were placed in the United States mail, postage prepaid, addressed as follows:

The Honorable Lewis T. Babcock
United States District Judge
United States Courthouse, Room C-145
1929 Stout Street
Denver, Colorado 80294

Henry V. S. Hall, Esq.
Denver Water Department
1600 West 12th Avenue
Denver, Colorado 80254

/s/

_____

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KELLY J. DEHERRERA, Plaintiff-Appellant, v. CITY AND COUNTY OF DENVER, acting by, and through its Board of Water Commissioners; W. THOMAS RICHARDS, individually and in his official capacity as Superintendent of Maintenance of the Denver Water Department; CHARLES CHAPMAN, individually and in his official capacity as Transportation Foreman of the Denver Water Department, Defendants-Appellees.	)	No. 93-1070 (D.C. No. 90-B-2260) (D. Colo.)
David L. Smith, Attorney-Appellant.	)	
KELLY J. DEHERRERA, Petitioner, v. LEWIS T. BABCOCK, District Judge, Respondent.	)	No. 93-1139 (D.C. No. 90-B-2260) (D. Colo.)

ORDER AND JUDGMENT*
(Filed September 3, 1993)

Before TACHA, BRORBY, and KELLY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Attorney David L. Smith and his client Kelly DeHerrera appeal the district court's award of sanctions against Smith (our No. 93-1070). They also petition for a writ of mandamus for relief from the sanctions award and for an order directing the district court to rule on motions and set the case for trial (our No.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

93-1139). Because the case in which the sanctions were awarded is still proceeding in the district court, this court lacks jurisdiction over the appeal. Appellees claim this is a frivolous appeal and seek sanctions. We agree that the appeal is frivolous and that sanctions against Smith personally are appropriate. We also deny the mandamus petition. Finally, we conclude that Smith's actions in both this appeal and other recent appeals warrant review by the court's disciplinary panel.

Smith represents DeHerrera in an employment discrimination case in the district court. On January 25, 1993, the district court denied Smith's[1] four then-pending motions for reconsideration of the magistrate judge's orders. It also directed that Smith respond to defendants-appellees' motions for attorneys' fees. On February 4, pursuant to 28 U.S.C. § 1927, the district court ordered Smith to pay appellees' attorneys' fees incurred in responding to the four motions for reconsideration. The court

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[1] For simplicity, because Smith is the focus of the sanctions and appeal and because the district court found Smith and not DeHerrera responsible for the motions, we will exclude further reference to DeHerrera.

noted that it had previously denied six motions for reconsideration that Smith filed and that it had cautioned Smith about the lack of merit to his motions for reconsideration. Characteristically, Smith moved for reconsideration of the February 4 order, and the district court denied that motion. On March 1, the district court ordered Smith to pay appellees $7,627.50 as sanctions under § 1927 and $2,287.50 for Rule 11 sanctions that the magistrate judge had awarded in March 1992. Smith appeals the sanction order. There are still outstanding motions in the district court, and the case has not yet been set for trial.

Noting the probable lack of jurisdiction, this court directed the parties to file briefs simultaneously by May 2 on the jurisdictional issue. Appellees filed their brief on April 12 and indicated they filed it "early in the hope that Mr. Smith will read it and move to dismiss this appeal." Appellees' Mem. Br. at 8. Appellees correctly point out that the jurisdictional issue is controlled by G.J.B. & Assocs., Inc. v. Singleton, 913 F.2d 824 (10th Cir. 1990). G.J.B. held first that a sanction order is not a final order for 28 U.S.C. § 1291 purposes:

> Without undue analysis, we join the majority of circuit courts that have addressed the issue and hold that a sanction order against an attorney currently of record is not a final decision for purposes of a § 1291 appeal where the underlying controversy remains unresolved.

913 F.2d at 827. G.J.B. then held that a sanction order is also not appealable under the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). G.J.B., 913 F.2d at 829. Contending there is no merit to any argument in favor of jurisdiction, appellees request sanctions for a frivolous appeal of $1,200.00 in attorneys' fees.

Smith filed his jurisdictional brief (which also included a petition for a writ of mandamus) on April 30. Smith cites G.J.B. but does not recognize it as controlling authority. He contends that the sanction order falls within the collateral order doctrine. He first quotes two long paragraphs from G.J.B. -- paragraphs that precede the court's holding that a sanction order does not fall within the Cohen exception -- in which the court notes there is a split of authority among the circuits over Cohen's applicability to sanction orders, and then discusses the Cohen requirements for a

collateral order. Appellant's Mem. Br. at 9 (quoting G.J.B., 913 F.2d at 827-28). Citing a number of cases from other circuits, including several that the court specifically rejected in G.J.B., Smith then argues that the sanction order is an appealable collateral order because it "conclusively determined the disputed question of sanctions, and resolved this important issue completely separate from the merits of the action." Appellant's Mem. Br. at 10.

Smith further contends that "[i]f the Plaintiff ultimately prevails on the merits, or if the case is settled, Plaintiff's attorney might never be able to receive any appellate review of Judge Babcock's orders if he is denied that opportunity now. Judge Babcock's orders are therefore effectively unreviewable on appeal from a final judgment, and are clearly appealable under . . . Cohen." Appellant's Mem. Br. at 10. We recognized and rejected this precise argument in G.J.B. when we concluded that a sanction order was not an appealable collateral order:

> [W]e join the First, Third and Fifth Circuits and hold that a sanction order against counsel currently of record is not appealable under the Cohen collateral order exception to the final judgment rule. Instead, counsel must await the conclusion of the

> underlying lawsuit and then appeal under § 1291. We reject any notion that an attorney risks losing the right to appeal if the parties settle or elect not to appeal from the final judgment. . . . [W]e see nothing to prohibit an attorney of record from appealing a sanction order when the main case concludes. Such an appeal is best heard after final judgment since the appellate court will likely need to review the record as a whole to determine the propriety of sanctions.

913 F.2d at 829 (citations and footnote omitted).

Inexplicably, Smith acknowledges G.J.B.'s rejection of an attorney's loss of appeal rights, but then says that even if he has not lost the right to appeal, "he has lost the $9,915.00 that Judge Babcock has ordered him to pay." Appellant's Mem. Br. at 11-12. His contention appears to be that the mere size of the sanction award requires a different result from G.J.B. See id. at 12. He cites no authority for this argument, nor does he indicate what harm he will suffer from having to pay the sanctions prior to resolution of the case on the merits. Again, G.J.B. rejected an Eleventh Circuit case in which the size of the sanction award was found to be relevant to the reviewability issue. 913 F.2d at 829

(rejecting DeSisto College, Inc. v. Line, 888 F.2d 755, 762-63 (11th Cir. 1989), cert. denied, 495 U.S. 952 (1990)).

We conclude that G.J.B. controls this case and see no reason for departing from it and not dismissing the appeal. The case is still proceeding in the district court, and Smith is still attorney of record.

The next question is whether Smith should be sanctioned for ignoring controlling authority and filing a frivolous appeal. He does cite G.J.B. but in a duplicitous manner by basing his argument primarily on the court's preliminary thoughts instead of its holding. His main argument was specifically rejected by G.J.B. Moreover, we do not believe his alternative argument is a good faith argument for overruling or creating an exception to G.J.B. Smith is simply "appealing in the face of dispositive contrary authority without making arguments for overruling it," which is a basis for finding his appeal frivolous. Hendrix v. Page (In Re Hendrix), 986 F.2d 195, 200 (7th Cir. 1993); see also McEnery v. Merit Sys. Protection Bd., 963 F.2d 1512, 1516-17 (Fed. Cir. 1992) (awarding sanctions on appeal for failing to reference or

discuss controlling precedent); Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., 833 F.2d 208, 212 (9th Cir. 1987) (awarding sanctions in part because argument on appeal ignored controlling Supreme Court authority).

But what makes this appeal particularly egregious is the fact that twice within the past seven months we have similarly dismissed appeals of sanction orders filed by Smith and cited G.J.B. on both occasions. See Sandlin v. Canady (In re Canady), No. 92-1169 (10th Cir. April 27, 1993) (Order and Judgment on petition for rehearing); Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993) (Order dismissing appeal and remanding for imposition of sanctions for frivolous appeal). It is thus clear that not only is Smith's conduct in this appeal sanctionable under both Fed. R. App. P. 38 and 28 U.S.C. § 1927, but that his practice of appealing in light of contrary controlling authority raises concerns about his fitness to practice before this court.

As noted earlier, appellees requested $1,200.00 in sanctions for their attorneys' fees spent responding to the appeal. Smith's

jurisdictional brief, filed over two weeks later, responded to neither appellees' request for sanctions nor the amount of the sanctions. Smith has obviously had adequate notice of the possibility of sanctions for a frivolous appeal and an opportunity to respond, see Braley v. Campbell, 832 F.2d 1504, 1515 (10th Cir. 1987), and has chosen not to respond. We therefore order that Smith personally, and not his client, is sanctioned $1,200.00 for this frivolous appeal and that he pay that amount to appellees.

Smith's mandamus petition warrants only brief discussion. He first seeks an order that would essentially reverse the district court's sanction award on the merits. Because he can eventually appeal that award, mandamus now is not appropriate. Journal Publishing Co. v. Mechem, 801 F.2d 1233, 1235-36 (10th Cir. 1986). The mandamus petition also seeks an order directing the district court to rule on pending motions and set the case for jury trial. We denied a similar petition in this case on December 28, 1992, DeHerrera v. Babcock, No. 92-1373 (10th Cir. December 28, 1992); Smith's petition for rehearing of that order was denied on February 4. In his present petition Smith does not explain how

circumstances have changed and why he now is entitled to relief, other than to note that more time has passed. He thus has failed to show an indisputable right to a writ of mandamus. Journal Publishing, 801 F.2d at 1235.

The appeal is DISMISSED and the petition for writ of mandamus is DENIED. Appellees' request for sanctions is GRANTED, and Smith personally is ORDERED to pay appellees $1,200.00. This matter is REFERRED to the court's attorney disciplinary panel for further proceedings.

The mandate shall issue forthwith in No. 93-1070.

ENTERED FOR THE COURT
PER CURIAM

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KELLY J. DEHERRERA,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 93-1070
	)	
CITY AND COUNTY OF DENVER, acting by, and through its Board of Water Commissioners; W. THOMAS RICHARDS, individually and in his official capacity as Superintendent of Maintenance of the Denver Water Department; CHARLES CHAPMAN, individually and in his official capacity as Transportation Foreman of the Denver Water Department,	)	
	)	
Defendants-Appellees.	)	
	)	
	)	
David L. Smith,	)	
	)	
Attorney-Appellant.	)	
	)	
KELLY J. DEHERRERA,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 93-1139
	)	
LEWIS T. BABCOCK, District Judge,	)	
	)	
Respondent.	)	

ORDER
(Filed February 20, 1994)

Before TACHA, BRORBY, and KELLY, Circuit Judges.

Before the court is defendants' motion for issuance of citation to David L. Smith. In an order and judgment dated September 3, 1993, the court ordered Mr. Smith to pay $1,200 in sanctions to defendants/appellees. On September 16, the court clarified the order and judgment to the extent that it ordered Mr. Smith to pay the sanctions to defendants/appellees by November 1, 1993. In their motion, defendants/appellees state that Mr. Smith has not paid the sanctions, sought a stay of the sanction award, or posted a bond.

The court therefore orders that Mr. Smith show cause why the court should not find him in contempt for failing to comply with the court's orders dated September 3 and September 16. Mr. Smith's response shall be filed no later than ten days from the date of this order.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/
Patrick Fisher
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KELLY J. DEHERRERA, Plaintiff-Appellant, v. CITY AND COUNTY OF DENVER, acting by and through its Board of Water Commissioners; W. THOMAS RICHARDS, individually and in his official capacity as Superintendent of Maintenance of the Denver Water Department; CHARLES CHAPMAN, individually and in his official capacity as Transportation Foreman of the Denver Water Department, Defendants-Appellees.	)	No. 93-1070
David L. Smith, Attorney-Appellant.	)	
KELLY J. DEHERRERA, Petitioner, v. LEWIS T. BABCOCK, District Judge, Respondent.	)	No. 93-1139

RESPONSE TO ORDER TO SHOW CAUSE

(Filed March 7, 1994)

Pursuant to the Order to Show Cause issued by this Court on February 23, 1994, David L. Smith, by his attorneys, submits the following response as good cause shown for not finding him in contempt for failure to pay the sanctions ordered by this Court on September 16, 1993. Additionally, Smith believes that this response demonstrates good cause shown for his noncompliance with the September 3, 1993 order entering sanctions in this case. Alternatively, Smith requests a stay of the contempt proceedings, or the imposition of any punishment contemplated, until such time as the United States Supreme Court has had an opportunity to consider and rule upon Smith's petition for writ of certiorari in *In re David L. Smith* No. 93-631 (10th Cir.) requesting review of the suspension. That petition will be filed with the Supreme Court shortly. In support hereof, Smith states the following:

I. Smith is Unable to Pay the Sanctions Imposed

1. Smith is wholly unable to pay the sanctions entered by this Court in its September 3, 1993 Order in the instant action. Similarly, he is unable to pay the other sanctions referenced in the November 29, 1993 Order of this Court suspending him from practice before this Court. Smith lacks any means separate and apart from his law practice that would enable him to pay the sanctions. Because of the effect this Court's suspension is having upon his ability to practice before all courts to which he is admitted to practice, Smith does not foresee that he will be able to pay the sanction in the near future. Thus, it is, and will be, impossible for Smith to comply with the September 3, 1993 Order in an effort to avoid a contempt citation. This demonstrates good cause shown why Smith should not be held in contempt.

2. Smith recognizes the authority of the court to impose "any appropriate disciplinary action against any attorney . . . for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court," *In re Snyder*, 472 U.S. 634, 642-45 (1985); *Burkett v. Chandler*, 505 F.2d 217 (10th Cir.

1974), and that the disciplinary powers of the courts are directed at controlling conduct by attorneys that demonstrates an affront to the authority of the court, *Braley v. Campbell*, 832 F.2d 1504, 1510 n.5 (10th Cir. 1987) (*citing In re Snyder*, 472 U.S. at 645, 105 S.Ct. at 2881; *Miranda v. Southern Pacific Transportation Co.*, 710 F.2d 516, 521 (9th Cir. 1983); *see also Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 565-68 (3d Cir. 1985) (*en banc*)).

3. However, Smith asserts that these powers should be tempered by certain equitable considerations. In particular, Smith contends that, under the guidelines established by this Court in *White v. General Motors Corp, Inc.*, 908 F.2d 675 (10th Cir. 1990), as well as precedent from other courts, *see Tinsley v. Mitchell*, 804 F.2d 1254 (D.C.Cir. 1986), the court must consider Smith's ability to pay or obey the disciplinary sanction imposed.

4. Where a court is considering a contempt citation for non-compliance with a sanctions order, the court is required to take into account reasonable steps to adjudicate and make specific findings regarding the alleged contemnor's claim of impossibility of performance. *See United States v. Rylander*, 460 U.S. 752,

757, 103 S.Ct. 1548, 1552 (1983) (improper to impose contempt if contemnor is unable to satisfy the court's direction); *Tinsley v. Mitchell*, 804 F.2d 1254 (D.C.Cir. 1986) (same).

5. In *Tinsley v. Mitchell*, 804 F.2d 1254 (D.C.Cir. 1986), following issuance of an order to show cause by the district court to an attorney who was ordered to pay monetary sanction imposed by the district court, the attorney indicated that he had been proceeding in good faith in an effort to satisfy the sanctions, but that he was unable to do so. In support, he cited several reasons, including the lack of financial reward from his law practice as well as his fruitless efforts to secure financial assistance through other sources. Notwithstanding such showing, the district court found the attorney in contempt and imposed a further fine of $50 per day until the underlying $5,000 sanction was fully paid. On appeal, the circuit court remanded the case pointing out that impossibility of performance constitutes a defense to contempt, noting that courts are "obliged to consider carefully a claim by the alleged contemnor that compliance was impossible." *Tinsley v. Mitchell*, 804 F.2d at 1256 (*citing Maggio v. Zeitz*, 333 U.S. 56,

72-77, 68 S.Ct. 401, 409-12 (1948); *NRDC, Inc. v. Train*, 510 F.2d 692, 713 (D.C.Cir. 1975); and *SEC v. Ormant Drug & Chemical Co., Inc.*, 739 F.2d 654, 656-57 (D.C.Cir. 1984)).

6. The United States Supreme Court, in *United States v. Rylander*, 460 U.S. 752, 103 S.Ct. 1548 (1983), a contempt proceeding based on the defendant's failure to produce documents in compliance with an Internal Revenue Service summons, held that the defendant may present, and the court must consider, the contemnor's present inability to comply with the order in question. *United States v. Rylander*, 460 U.S. at 757, 103 S.Ct. at 1552-53.

7. Additionally, pursuant to this Court's opinion in *White*, certain equitable and limiting factors must be considered by a court when determining appropriate monetary sanctions to be imposed in a given case, including: (1) reasonableness of the requested attorney fee sanctions; (2) the minimum sanction necessary to deter the offending conduct; (3) the offender's ability to pay the sanction; and (4) other relevant factors including severity of the violations, history of the parties, and any malice or

bad faith behind the violation. *White v. General Motors Corp, Inc.*, 908 F.2d at 684-85.

8. With respect to ability to pay, this Court in *White* pointed out that, because of their deterrent purpose, sanctions are analogous to punitive damages, and, as such, any imposition of sanctions should appropriately include considerations of the financial condition of the offender. *White v. General Motors Corp, Inc.*, 908 F.2d at 684-85.

9. Although the court in *White* was presented on appeal with a Rule 11 sanction in which attorney fees were awarded, because the sanctioning authority of the Appellate Courts pursuant to Fed.R.App.P. 38 is analogous to Rule 11, the reasoning in *White* is germane. These same considerations are consistently applied by courts in all types of attorney fee awards. *See Faraci v. Hickey-Freeman Company, Inc.*, 607 F.2d 1025, 1028 (2d Cir. 1979) ("the express grant of authority to award fees [pursuant to statute] presumes continued application of equitable considerations" . . . "particularly . . . the sanctioned party's ability to pay."); *United States Steel Corp. v. United States*, 519 F.2d 359, 363 (3d

Cir. 1975) (where fee shifting is permitted pursuant to statute, equitable considerations govern); *see also* G. Joseph, *Sanctions: The Federal Law of Litigation Abuse*, § 23(D) at 355-57 (1989) (in balancing equities when considering sanctions under § 1927, ability of the offender to pay is an appropriate consideration).

10. Based on these analyses, it is clear that ability to obey must be considered by the court before the terms of contempt are imposed. "[T]he court is required to take such reasonable steps as necessary to adjudicate a colorable claim of impossibility of performance." *Tinsley v. Mitchell*, 804 F.2d at 1256 (*citations omitted*).

11. As previously indicated, Smith is without the financial means to satisfy the sanction imposed against him. He has negative net worth and no income aside from his law practice. *See Smith Affidavit*, attached. Further, the effect of this Court's suspension has impacted his ability to practice before all courts to which he is admitted to practice.[1] Consequently, he is unable to

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1 *A. In the United States District Court for the District of Colorado:* On December 8, 1993, the Committee on

Conduct of the United States District Court for the District of Colorado informed Smith that, pursuant to Local Rule of 83.6 of that court, Smith was immediately and indefinitely suspended from practice before that court, *nunc pro tunc* to the date of the suspension by the Tenth Circuit, absent a showing of good cause why the suspension should not have been imposed by the Tenth Circuit. Smith's response to the Committee on Conduct included with it, as demonstrative of good cause, those pleadings and supporting materials which he had filed before the Tenth Circuit in conjunction with his motion for stay before the Circuit. After Smith responded, the Committee on Conduct notified Smith on January 18, 1994, that it was seeking guidance from the district court as to how to proceed because Smith had demonstrated good cause sufficient to warrant further investigation and a hearing by a panel of committee members.

On January 26, 1994, Smith received notice that the Committee on Conduct would conduct a hearing on February 15, 1993 for a determination of good cause as to whether a different sanction than that of the Tenth Circuit should be imposed. At that hearing, Smith offered testimony further supporting his good faith, lack of malice or vexatiousness, and inability to pay as good cause shown for the consideration of lesser, or no, sanction by the district court. The results of that proceeding are not yet known. However, Smith remains under suspension in the district court, where he maintains almost all of his practice. Several of his pending cases have been stayed pending the resolution of these district court disciplinary proceedings.

B. United States Court of Appeals for the Federal Circuit: On January 19, 1994, the United States Court of Appeals for the Federal Circuit issued an order directing Smith to respond within fourteen days, otherwise a reciprocal suspension would be imposed upon him in that court. Smith filed a response on January 31, 1994, and has continued to supplement that response as appropriate. Consideration of identical suspension in that circuit remains pending.

engage in his livelihood and, therefore, is wholly unable to pay the monetary sanctions that underlie his suspension.

12. Of course, the court may also consider the alleged contemnor's good faith efforts to comply in mitigation of any penalty. *See Washington Metro. Area Transit Auth. v. Amalgamated Transit Union*, 531 F.2d 617 (D.C.Cir. 1976). With that in mind, Smith respectfully reiterates that he is without the financial resources to pay any of the sanctions imposed against him. Further, his efforts to raise the money to satisfy the sanctions orders have been fruitless. *See Smith Affidavit*, attached. Although Smith is married and has sought the financial assistance of his spouse, who is also an attorney, she is committed to the principle that the sanctions imposed against Smith were erroneous insofar as the precedent underlying the sanctions are the subject of

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C. Supreme Court of Colorado: On December 15, 1993, Disciplinary Counsel of the Colorado Supreme Court Grievance Committee informed Smith that it was commencing an investigation based upon the Tenth Circuit's suspension order. That investigation remains pending.

a split of authority among the circuit courts. *See Hook Affidavit*, attached.

13. Finally, Smith suggests that failure to satisfy court imposed monetary orders is ordinarily, and perhaps more appropriately, remedied via a writ of execution once the orders have become final, and not by a finding of contempt when the orders are not considered final for purposes of their appeal. *See Combs v. Ryan's Coal Company, Inc.*, 785 F.2d 970, 980 (11th Cir. 1986) (citations omitted).

II. This Court Should Await Consideration by United States Supreme Court on Smith's Petition for Writ of Certiorari in His Suspension Proceeding.

14. On November 29, 1993, the disciplinary panel of this Court suspended Smith from practice before the Tenth Circuit for filing "frivolous" appeals. In all but one of the four underlying cases relied upon by the panel, those appeals concerned the issue of this Court's jurisdiction to hear an interlocutory appeal of monetary sanctions imposed upon an attorney by the district court. The sanction upon which the instant order to show cause is based arises from one such appeal. *See Deherrera v. Denver*, Nos. 93-

1070 and 93-1139, Order at 4 (10th Cir. September 3, 1993). In bringing those interlocutory appeals, Smith, in good faith, relied on accepted and well-reasoned legal arguments from at least four other circuit courts which permit such appeals. Thus, Smith is currently preparing a petition for writ of certiorari for filing with the Supreme Court, contending that it was improper for this Court to punish him with monetary fines, and ultimately suspension (already exceeding ninety days), simply for advancing a legal argument, recognized in other jurisdictions, but which confront contrary precedent of this Circuit. On February 14, 1994, Smith filed with the Supreme Court an Application for Stay [of the suspension] Pending Petition for Writ of Certiorari with Justice Ruth Bader Ginsburg of the Court. That Application was denied on February 16, 1994.

15. In attempting to seek review of sanctions that had been levied against him by the district court in this action, Smith advanced the argument that this Court had jurisdiction to hear his appeal under the collateral order rule first stated in *Cohen v.*

Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221 (1949).

16. Under the *Cohen* doctrine, in determining when a collateral order is a "final decision" such that appellate jurisdiction is conferred pursuant to 28 U.S.C. § 1291, an order "must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2455, 2457-59 (1978) (*discussing Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. at 546, 69 S.Ct. at 1225).

17. Although Smith was well aware of this Court's interpretation of the *Cohen* factors by virtue of the Court's holding in *G.J.B. & Assoc. v. Singleton*, 913 F.2d 824 (10th Cir. 1990) denying the right to immediate appeals of attorney fee sanctions, application of these criteria to appeals of fixed attorney fee sanctions is the subject of a split of authority among the circuit courts of appeals.

18. The Second, Seventh, Ninth, and Eleventh Circuits hold that where counsel is the recipient of monetary sanctions by a district court, such an order is immediately appealable because the *Cohen* criteria have been fulfilled. *See DeSisto College, Inc. v. Line*, 888 F.2d 755, 762-63 (11th Cir. 1989), *cert. denied*, 495 U.S. 952 (1990); *Sanko S.S. Co., Ltd. v. Galin*, 835 F.2d 51, 53 (2d Cir. 1987); *Frazier v. Cast*, 771 F.2d 259, 262 (7th Cir. 1985); *Optyl Eyewear Fashion International Corp. v. Style Companies*, 760 F.2d 1045, 1047 n.1 (9th Cir. 1985) (relying on both § 1291 "final order" and *Cohen* cases). The reasons for permitting such appeals articulated by courts analyzing this jurisdictional issue under *Cohen* are several. First, the award of attorney fees as a sanction is a conclusive determination. *See Sanko S.S. Co., Ltd. v. Galin*, 835 F.2d at 53; *Frazier v. Cast*, 771 F.2d 259, 262 (7th Cir. 1985). Second, the issue of sanctions is distinct from the merits of the action. *See Sanko S.S. Co., Ltd. v. Galin*, 835 F.2d at 53; *Frazier v. Cast*, 771 F.2d at 262. Finally, a sanctions award against counsel: (a) may be personally burdensome, both financially and in that it may generate certain

ethical problems, *Cheng v. GAF Corp.*, 713 F.2d 886, 89 (2d Cir. 1983); and (b) is often not effectively reviewable upon entry of final judgment, because, among other things, counsel may withdraw from a case for any number of reasons prior to the conclusion of the case, counsel's client may prevail on the merits, settle the case or otherwise elect not to appeal, thereby precluding counsel's ability to challenge the sanctions entered against him. *See Sanko S.S. Co., Ltd. v. Galin*, 835 F.2d at 53; *Frazier v. Cast*, 771 F.2d at 262.

19. The Ninth Circuit has additionally determined that attorney fee sanctions are immediately appealable because they are "final orders" pursuant to 28 U.S.C. § 1291. *See David v. Hooker, Ltd.*, 560 F.2d 412 (1977); *see also Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339, 345 (9th Cir. 1983); *Liew v. Breen*, 640 F.2d 1046, 1048 (9th Cir. 1982). In considering whether to allow immediate appeals of attorney fee sanctions, the Ninth Circuit pointed out that "the requirement of finality is to be given a 'practical rather than technical construction.'" *David v. Hooker, Ltd.*, 560 F.2d at 417-18 (*citing Gillespie v. United States*

Steel Corp., 379 U.S. 148, 152-53, 85 S.Ct. 308, 311, 13 L.Ed.2d 199 (1964)). Thus, as a practical matter, the Ninth Circuit held that "[a]s in the case of a civil contempt order, the non-party [attorney] cannot argue the propriety of the [] sanction for attorney's fees in an appeal from the final judgment as a party to the suit would be able to do. Unless he can obtain a review of the order and sanction at the time it is imposed, a non-party will have no right of review at all." *David v. Hooker, Ltd.*, 560 F.2d at 418.[2]

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2 A third group of circuits is undecided or unclear in terms of allowing immediate appeals of attorney fee sanctions against counsel of record. Like the Fifth Circuit, the Third Circuit has held that sanctions may be immediately appealed by counsel who has withdrawn from the underlying action. *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 538 (3d Cir. 1985). In *Eavenson*, the court specifically declined to "adopt a rule that would allow immediate appellate review of *any* sanction order imposed upon counsel, whether counsel has withdrawn or not." *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d at 539 (emphasis in original). However, in *In re Jeannette*, 832 F.2d 43 (3d Cir. 1987), the court declined to exercise jurisdiction over an immediate appeal of sanctions because the amount of the sanction had not yet been determined. Further, in *Eastern Maico Distributing, Inc. v. Maico-Fahrzeugfabrik*, 658 F.2d 944 (3d Cir. 1981), the Third Circuit declined to exercise jurisdiction over an immediate

20. In contrast, this circuit, along with the First and Fifth Circuits hold that an attorney must wait until the underlying action has concluded until attorney fees orders may be appealed.

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appeal of sanctions which had been levied against counsel and a party to the ongoing action. These cases leave the impression that the Third Circuit may entertain such appeals when sanctions are levied against a lawyer, but not the client, and the amount of the sanction has been fixed.

Additionally, the Federal Circuit, after some discussion of the "final order" requirement of 28 U.S.C. § 1295 (the Federal Circuit counterpart to § 1291), accepted jurisdiction over an appeal of a statutory attorney fee award. *PPG Industries, Inc. v. Celanese Polymer Specialties Co., Inc.*, 840 F.2d 1565, 1567 (Fed. Cir. 1988). The court engaged in considerable discussion of the issue of finality, suggesting that some matters remained pending in the underlying action. The court ultimately deferred to the district court's order certifying the award as "final and appealable." *Id.* Ordinarily, such certifications are made pursuant to Fed.R.Civ.P. 54(b), however, "[a]n award of attorney's fees does not fall within the ambit of Rule 54(b) certification, which is directed towards determinations of the parties' claims." *Cheng v. GAF Corp*, 713 F.2d 886, 888 (2d Cir. 1983) (*citing Swanson v. American Consumer Industries, Inc.*, 517 F.2d 555, 560-61 (7th Cir. 1975)). Thus, the court's jurisdiction is left to "appellate jurisdiction under the collateral order doctrine." *Cheng v. GAF Corp*, 713 F.2d 886, 888 (2d Cir. 1983) (*citing Cohen v. Industrial Loan Corp*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949)). Accordingly, it is not unreasonable to infer from *PPG* that the Federal Circuit may be inclined to accept immediate appeals of attorney fee awards.

See G.J.B. & Assoc. v. Singleton, 913 F.2d 824, 827-29 (10th Cir. 1990); *Click v. Abilene National Bank*, 822 F.2d 545, 544-45 (5th Cir. 1987); *In re Licht & Semonoff*, 796 F.2d 564, 568-72 (1st Cir. 1986). The First and Fifth Circuits do not consider the *Cohen* standard to be applicable at all, nor discovery sanctions to be "final orders" under 28 U.S.C. § 1291. *In re Licht & Semonoff*, 796 F.2d at 568-72; *Click v. Abilene National Bank*, 822 F.2d at 544-45. However, the Fifth Circuit has since allowed immediate appeals when counsel has withdrawn from the underlying action. *Markwell v. County of Bexar*, 878 F.2d 899, 901 (5th Cir. 1989). This circuit's rationale for precluding interlocutory appeals of any sanction order is that there is "nothing to prohibit an attorney of record from appealing a sanction order when the main case concludes." *G.J.B. & Assoc. v. Singleton*, 913 F.2d at 829.

21. Smith believes that this Court's holding in *G.J.B. & Assoc. v. Singleton*, while apparently recognizing that: (a) sanction awards are conclusive determinations, *G.J.B. & Assoc. v. Singleton*, 913 F.2d at 829 (relying on third prong of *Cohen* test for denying jurisdiction); *see also Coopers v. Livesay*, 437 U.S. at

468, 98 S.Ct. at 2457-59; *Cheng v. GAF Corp*, 713 F.2d at 889; and (b) sanction awards are undeniably separate and distinct from the merits of the underlying case, *Id.* (all cites), the Tenth Circuit's opinion, nonetheless, reflects (as Smith will suggest to the Supreme Court) a practical misunderstanding about the policy and purpose behind § 1291 and the *Cohen* collateral order doctrine. Specifically, Smith contends that forcing counsel to wait until final judgment may be personally burdensome or present ethical dilemmas, *see Cheng v. GAF Corp*, 713 F.2d at 889, or be cut-off entirely by settlement or a client's unwillingness to appeal. *See Sanko S.S. Co., Ltd. v. Galin*, 835 F.2d at 53; *Frazier v. Cast*, 771 F.2d at 262. Indeed, his ability to challenge the interlocutory appealability of such orders would be rendered moot if counsel is forced to wait until a final judgment of the entire case is handed down. The United States Supreme Court would be unable, on the grounds of mootness, to resolve this conflict among the circuits by a case from a circuit like the Tenth Circuit.

22. Indeed, this Court has commented that the circuit courts are "sharply divided on the question of whether such an

order is immediately appealable as an exception to the 'final decision' rule under the collateral order doctrine first announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949)." *G.J.B. & Assoc. v. Singleton*, 913 F.2d at 827. Had Smith brought these appeals before the Second, Seventh, Ninth or Eleventh Circuits, they clearly would have, indeed, been meritorious, and not merely non-sanctionable.[3]

23. Further, because the district court orders were entered as "immediately payable," Smith had a good faith and well reasoned belief that such orders were in the nature of injunctive

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3 *See* Hon. Walter V. Schaefer (retired Justice of the Supreme Court of Illinois), *"Comment: Reliance on the Law of the Circuit -- A Requiem,"* 1985 Duke L.J. 690. Justice Schaefer attacked the proposition that the "law of the circuit" principle should result in "thirteen separate legal enclaves" and the "Balkanization" among circuits. He recognizes that "the reliability of a court of appeals decision vanishes in the face of a conflict among the circuits." *Id.* at 691. Smith's anticipated challenge to his suspension and, ultimately, to the underlying sanctions, including the instant sanction, will address this Court's power to punish him for violating the law of the circuit by conduct deemed legitimate and appropriate in many, if not most, circuits that have addressed the issue in the absence of controlling Supreme Court authority.

orders and, therefore, were immediately appealable interlocutory orders under 28 U.S.C. § 1292(1).[4]

24. As stated previously, the question of whether attorney fee sanctions, the amount of which has been fixed, are immediately appealable as a collateral final order under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221 (1949), is presently the subject of a petition for writ of certiorari which Smith anticipates filing forthwith, along with the issue of whether an attorney can be sanctioned for conduct in one circuit that is perfectly proper in at least four other circuits.

25. By that petition, Smith contends that: (a) this Court erroneously sanctioned (and ultimately suspended) him because of his good faith challenge to this Court's conflicting interpretation of

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4 Indeed, the Tenth Circuit has recently stated that, under the *Cohen* rule, "[f]or appellate jurisdiction in [a] case, the challenged order must (1) have the practical effect of refusing or granted an injunction, (2) threaten a serious, perhaps irreparable, consequence, and (3) be effectually challenged only by immediate appeal." *Utah v. Kennecott Corp.*, ___ F.2d ___, No. 92-4173, Order and Judgment (10th Cir. January 31, 1994) (*applying Cohen*) (*emphasis added*).

Supreme Court precedent, which is also the subject of a sharp split among the circuit courts, whereby this Court will not permit immediate appeals of sanction awards; (b) attorney fee sanctions are, indeed, "collateral orders" under the rule of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221 (1949) such that they are immediately appealable; and (c) the denial of review from a district court order, and the further imposition of sanctions by a circuit court (again, based on the circuit's conflicting interpretation of Supreme Court precedent) effectively amounts to a prejudgment of the appellate process.

26. Smith respectfully suggests that, for the reasons demonstrated above, the Tenth Circuit's precedent is "in conflict with the decision of another United States court of appeals on the same matter," and the actions of the Tenth Circuit represent a departure from the "accepted and usual course of judicial proceedings" significant enough to warrant the exercise of this Court's supervisory powers, thus, there exists "special and important reasons" for review by the United States Supreme Court.

S.Ct.R. 10.1.[5] Because his actions which underlie the original sanction imposed by this Court were based on good-faith and well-reasoned reliance on conflicting circuit precedent, and, therefore, do not amount to an affront or attack on the dignity or authority of this Court, Smith respectfully suggests that it would be improper for this Court to coerce him to obey what the Supreme Court may

---

5 Further, Smith believes that he was entitled to, and denied, an opportunity to respond to this Court's consideration of the instant sanctions. This Court's April 2, 1993 letter from the Appeals Expediter specifically instructed the parties to "address ***only*** the jurisdictional issue." *Deherrera v. City and County of Denver*, No. 93-1070, Letter (10th Cir. April 2, 1993) (emphasis in original). Because of this strict limitation, Smith contends that the defendant/appellee's motion for sanctions was improperly raised, and that any attempt by Smith to respond to that motion would have fallen outside the scope of the Court's strict letter instruction. Accordingly, he did not address the sanctions issue either in his jurisdictional brief or by separate response. Nonetheless, this Court granted the motion and entered the instant sanctions against Smith. *Deherrera v. City and County of Denver*, No. 93-1070, Order (10th Cir. September 3, 1993). Pursuant to *Braley v. Campbell*, 832 F.2d 1504 (10th Cir, 1987), and in keeping with the principles of due process, Smith asserts that he was entitled to an opportunity to respond to the threat of sanctions prior to such sanctions being considered or imposed by the Court. Thus, he contends that the Court's failure to do so is a denial of due process under the Fifth and Fourteenth Amendments to the United States Constitution.

ultimately determine to be an invalid order. Accordingly, he requests that this Court stay this contempt proceeding until the Supreme Court has resolved the circuit conflict or otherwise spoken on the propriety of sanctions in these circumstances.

WHEREFORE, Mr. Smith respectfully submits that he has demonstrated good cause shown for not finding him in contempt of this Court's September 3, 1993 Order insofar as he lacks the financial means to comply with the order. Alternatively, Smith submits that he has shown good cause for this Court to stay this proceeding until the United States Supreme Court has been given the opportunity to address and speak to the issue. FURTHER, Mr. Smith, respectfully requests that this matter be set for oral argument by Smith's counsel in this matter, at which hearing Mr. Smith will make himself available to the Court to address, under oath, any questions or concerns which the Court may have.

Respectfully submitted,

BURNS, FIGA & WILL, P.C.

/s/

By:_____

Phillip S. Figa

One DTC, Penthouse Three
5251 DTC Parkway
Englewood, Colorado 80111
Telephone: (303) 796-2626

Attorneys for Attorney-Appellant
David L. Smith

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KELLY J. DEHERRERA, Plaintiff-Appellant, v. CITY AND COUNTY OF DENVER, acting by and through its Board of Water Commissioners; W. THOMAS RICHARDS, individually and in his official capacity as Superintendent of Maintenance of the Denver Water Department; CHARLES CHAPMAN, individually and in his official capacity as Transportation Foreman of the Denver Water Department, Defendants-Appellees.	)	No. 93-1070
David L. Smith, Attorney-Appellant.	)	
KELLY J. DEHERRERA, Petitioner, v. LEWIS T. BABCOCK, District Judge, Respondent.	)	No. 93-1139

AFFIDAVIT OF DAVID L. SMITH

I, David L. Smith, upon oath duly sworn, depose and state the following upon personal knowledge and subject to the penalties of perjury:

1. In 1972, I graduated from Southern Methodist University Law School with honors as a member of the Order of the Coif. From 1972 to 1974, I was employed by the U.S. Department of Justice, Civil Rights Division, in Washington, D.C. Thereafter, I attended Harvard University Law School, and in 1975 received an L.L.M. in Constitutional Law and Litigation. From 1976 to 1977, I was employed by Carrington, Coleman, Sloman, Johnson & Blumenthal in Dallas, Texas, doing labor litigation and defense work. During 1978, I served as a Deputy District Attorney in Denver, Colorado, during which time I conducted approxi-mately 25 jury trials. Since 1979, I have been a solo practitioner emphasizing civil rights and employment law.

2. I am a member of the Bar of the Tenth Circuit

Court of Appeals who, by Order dated September 3, 1993, was ordered to pay sanctions to the defendants/appellees in this action. That order was clarified on September 16, 1993, insofar as this Court ordered that such sanctions be paid by November 1, 1993.

3. The sanctions awarded against me in this case, and referenced in this Court's September 3, 1993 and September 16, 1993 Orders, total $1,200, excluding interest.

4. Additionally, by Order dated November 29, 1993, this Court ordered that I be suspended from practicing before this Court until all sanctions referenced in that Order have been paid, at which time I may apply for reinstatement if I can demonstrate that all such sanction orders have been paid. As a result, my ability to practice before all courts to which I am currently admitted to practice is severely jeopardized.

5. The sanctions referenced in this Court's November 29, 1993 Order presently exceed $50,000, excluding interest, and include the sanctions awarded against me in this case.

6. Currently, I am unable to pay the sanctions

referenced in either the September 3, 1993 Order or the November 29, 1993 Order. I do not foresee that I ever will be able to pay the referenced sanctions unless I can continue to practice law.

7. Attached to this Affidavit is my current financial statement. It is true and accurate. As it demonstrates, currently I have a negative net worth.

8. I do not have personal resources or collateral to borrow the money to pay any of the sanctions.

9. Further, my efforts to raise the money to satisfy the sanctions orders have been fruitless. I am married, however the finances and assets of myself and my spouse are kept strictly separate. I have sought the financial assistance of my spouse, who is also an attorney, however, she is committed to the principle that the sanctions were erroneously entered insofar as the underlying subject matter of the sanctions are the subject of a split of authority among the circuit courts. *See Hook Affidavit*, submitted herewith.

10. Finally, I no not have knowledge of any other third party who is willing and able to pay the sanctions for me.

FURTHER AFFIANT SAYETH NOUGHT.

/s/

David L. Smith

STATE OF COLORADO)
) ss.
COUNTY OF ARAPAHOE)

The foregoing instrument was acknowledged before me by David L. Smith this 7th day of March, 1994.

My commission expires November 5, 1994.

Witness my hand and official seal.

[S E A L]

/s/

Wilma Lee Ross, Notary Public
5251 DTC Parkway, PH-3
Englewood, Colorado 80111

FINANCIAL STATEMENT FOR DAVID L. SMITH

ASSETS:

Average Cash on Hand	$ 325.00
Estimated Value of Clothing	$ 1,500.00
Cost of Watch in 1986	$ 1,500.00
Contingent Interest in Judgment in Sandlin v. Corporate Interiors, Inc., et al.	$85,250.00
TOTAL ASSETS	**$88,575.00**

LIABILITIES:

Estimated Loan Balance to M. Julia Hook	$241,000.00
Average Credit Card Balance	$ 6,500.00
Federal Court Sanctions	$ 50,000.00
Legal Fees Owed to Burns, Figa & Will, P.C.	$ 7,255.00
TOTAL LIABILITIES:	**$304,755.00**
PRESENT NET WORTH	**-$216,180.00**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KELLY J. DEHERRERA, Plaintiff-Appellant, v. CITY AND COUNTY OF DENVER, acting by and through its Board of Water Commissioners; W. THOMAS RICHARDS, individually and in his official capacity as Superintendent of Maintenance of the Denver Water Department; CHARLES CHAPMAN, individually and in his official capacity as Transportation Foreman of the Denver Water Department, Defendants-Appellees.	)	No. 93-1070
David L. Smith, Attorney-Appellant.	)	
KELLY J. DEHERRERA, Petitioner, v. LEWIS T. BABCOCK, District Judge, Respondent.	)	No. 93-1139

AFFIDAVIT OF M. JULIA HOOK

I, M. Julia Hook, upon oath duly sworn, depose and state the following upon personal knowledge and subject to the penalties of perjury:

1. I am the spouse of attorney David L. Smith.

2. I am an attorney admitted to practice, and in good standing, before the Bar of State of Colorado, the Federal District Court for the District of Colorado, the Tenth Circuit Court of Appeals and the United States Supreme Court.

3. I am aware of the sanctions that have been entered against my spouse, David L. Smith, in this and other proceedings before this and other courts.

4. I am also aware that the legal precedent underlying the sanctions imposed against my spouse, David L. Smith, by the Tenth Circuit is presently the subject of a split of authority among the circuit courts of appeals of the United States, and may be contrary to the precedent of the United States Supreme Court.

5. The finances and assets of myself and my spouse are kept strictly separate.

6. David L. Smith has sought financial assistance from me in an effort to comply with the sanction orders entered against him, *see Smith Affidavit*, submitted herewith; however, I have declined to give him any such assistance on the principle that those sanctions, as well as the suspension imposed on him by this Court, were erroneously entered against him insofar as the underlying precedent that served as the basis for both is the subject of a split of authority among the circuit courts.

7. Finally, I do not have knowledge of any other third party who is willing and able to pay the sanctions on behalf of David L. Smith.

FURTHER AFFIANT SAYETH NOUGHT.

_____

M. Julia Hook

STATE OF COLORADO)
) ss.
COUNTY OF ARAPAHOE)

The foregoing instrument was acknowledged before me by M. Julia Hook this 7th day of March, 1994.

My commission expires November 5, 1994.

Witness my hand and official seal.

[S E A L]

/s/

Wilma Lee Ross, Notary Public
5251 DTC Parkway, PH-3
Englewood, Colorado 80111

United States District Court for the District of Colorado
Committee on Conduct
United States Courthouse
1929 Stout Street
Denver, CO 80294

December 8, 1993

PERSONAL AND CONFIDENTIAL

David L. Smith
1630 Welton St. #300
Denver, CO 80202

RE: 93-DP-28 David L. Smith

Dear Mr. Smith:

The United States District Court and its Committee on Conduct have received notice that you have been suspended from the practice of law before the United States Court of appeals for the Tenth Circuit in an Original Proceeding, Case No 93-631 until all sanctions are paid; that suspension is or was to be effective commencing November 29, 1993.

You are hereby notified that pursuant to D.C.Colo.LR. 83.6P, simultaneous and identical discipline shall be imposed by the United States District Court for the District of Colorado nunc pro tunc from the date of judgment of the United States Court of Appeals for the Tenth Circuit.

You are further notified that within ten (10) days of receiving this Notice, you may show cause in writing why simultaneous discipline should not have been imposed.

Sincerely,

COMMITTEE ON CONDUCT
JOHN M. RICHILANO, CHAIRMAN

By: /s/
Gail Gallaghan
Secretary

cc: James R. Manspeaker, Clerk
CERTIFIED MAIL/RETURN RECEIPT REQUESTED

United States District Court for the District of Colorado
Committee on Conduct
United States Courthouse
1929 Stout Street
Denver, CO 80294

January 18, 1994

Phillip Figa, Esq.
5251 DTC Parkway
Englewood, CO 80111

Re: David L. Smith

Dear Mr. Figa:

We have had a couple of discussions concerning the effect of D.C.Colo.LR. 83.6P on your client, David L. Smith, and whether the Committee on Conduct's practice in regard to discipline imposed by other courts is consistent or inconsistent with that rule. I informed you that I would seek clarification from Chief Judge Finesilver, and that you would receive a copy of that communication. However, having completed the letter and after further review, I do not believe I am at liberty to provide you with a copy of the letter because it contains a great deal of confidential material concerning the workings of the Committee. See D.C.Colo.LR. 83.6C. Nevertheless, you are entitled to know that the Committee has recommended that the Court adopt the Committee's practice, which would have the effect that your client would not be suspended in the district court until the Committee determined whether you have shown good cause, and if so, a hearing is held thereon.

You will be advised of the Court's response. However I have informed you that in the meantime it would be prudent for you and your client to assume that LR 83.6P is mandatory and self-executing, and that Mr. Smith currently is under suspension in district court. In this regard, Panel C of the Committee is in the process of determining whether sufficient cause has been

shown to entitle you client to a hearing on whether lesser discipline should be imposed. You will be informed of that decision by the Chairperson of Panel C, John Purvis.

If you have any questions, please do not hesitate to call.

Very truly yours,

/s/

John M. Richilano

JMR:lrt

cc: John Purvis, Esq.
Gail Callaghan

United States District Court for the District of Colorado
Committee on Conduct
United States Courthouse
1929 Stout Street
Denver, CO 80294

January 26, 1994

Phillip Figa, Esq.
BURNS, FIGA & WILL, P.C.
One DTC, Penthouse Three
5251 DTC Parkway
Englewood, CO 80111

Re: 93-DP-28
In re David L. Smith

Dear Mr. Figa:

Panel C of the Committee on Conduct has determined that your December 20, 1993 letter to the Committee on behalf of David Smith provides sufficient cause for a hearing to be held with respect to imposition of discipline on Mr. Smith by the United States District Court for the District of Colorado.

Enclosed is a Notice of Hearing for February 15, 1994 at 9:00 a.m. in Room C-159 of the U.S. District Courthouse.

Yours truly,

/s/
John A. Purvis

JAP/mbp
enclosure
cc: Ms. Gail Callaghan
Mr. John Richilano
Mr. William Lucero
Mr. E. Gregory Martin

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLORADO

Committee on Conduct

Case No. 93-DP-28

IN RE:

DAVID L. SMITH

NOTICE OF HEARING

TO: David L. Smith and His Attorney of Record

PLEASE TAKE NOTICE that a hearing will be held before Panel C of the U.S. District Court for the District of Colorado Committee on Conduct for its determination and recommendation as to whether simultaneous and identical discipline should be imposed on David L. Smith in the U.S. District Court for Colorado in response to the suspension of Mr. Smith from practice before the Tenth Circuit Court of Appeals.

Said hearing shall be held on Tuesday, February 15, 1994, beginning at 9:00 a.m., at the U.S. District Courthouse, Room c-159, 1929 Stout Street, Denver, Colorado.

COMMITTEE ON CONDUCT

By: /s/
John A. Purvis
William Lucero
E. Gregory Martin

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing NOTICE OF HEARING was mailed, postage prepaid, on the 26th day of January, 1994, to:

Phillip Figa, Esq.
BURNS, FIGA & WILL, P.C.
One DTC, Penthouse Three
5251 DTC Parkway
Englewood, CO 80111

/s/
Mary B. Pazych

DISCIPLINARY COUNSEL
SUPREME COURT OF COLORADO

Dominion Plaza Building
600 17th Street, Suite 510-South
Denver, Colorado 80202
(303) 893-8123

December 15, 1993 PERSONAL AND CONFIDENTIAL

CERTIFIED MAIL NO: P 387 750 775
RETURN RECEIPT REQUESTED

David L. Smith, Esq.
1630 Welton St. #300
Denver, CO 80202
80111

c/o Phillip Figa, Esq.
5251 DTC Parkway
Englewood, CO

Re: Investigation initiated by Disciplinary Counsel

Dear Mr. Smith:

This office has received Mr. Figa's letter of December 9, 1993, and attached order from the Tenth Circuit Court of Appeals. Pursuant to C.R.C.P. 241.9(a)(4), proceedings as provided in the rules are hereby commenced. Thank you for submitting the information. Please keep this office informed as the case develops.

An investigator will contact you by telephone or mail. After a full investigation, this matter will be presented to an Inquiry Panel of the Grievance Committee. You will be notified of the Panel's disposition.

This investigation is being assigned to James S. Sudler, Esq.

The rules for discipline of lawyers are contained in Chapter 20, C.R.C.P., Volume 7A, C.R.S. The Code of Professional Responsibility, incorporated into the rules by reference, appears an appendix to Chapters 18-20, C.R.C.P., applying to conduct occurring on or before December 31, 1992. The Colorado Rules of Professional Conduct, applying to conduct occurring on or after January 1, 1993, can be found in the current supplement to Volume 7A.

You are reminded that this request for an investigation is confidential as provided in C.R.C.P. 241.24. The confidentiality rule is not intended, however, to prevent you from gathering information or consulting about the matter with a lawyer or other necessary persons. Moreover, confidentiality may be waived, but only as provided in C.R.C.P. 241.24.

Sincerely,

/s/
L. Michael Henry
Chief Investigative Counsel

LMH/sk

DISCIPLINARY COUNSEL
SUPREME COURT OF COLORADO

Dominion Plaza Building
600 17th Street, Suite 510-South
Denver, Colorado 80202
(303 893-8123

December 17, 1993

PERSONAL AND CONFIDENTIAL

Phillip Figa, Esq.
5251 DTC Parkway
Englewood, CO 80111

Re: Request for investigation of David L. Smith initiated by Disciplinary Counsel

Dear Mr. Figa:

I have been assigned to investigate this matter. Please contact me when you have any new information regarding the Tenth Circuit proceeding.

Sincerely,

/s/
James S. Sudler
Investigative Counsel

JSS/llk

United States Court of Appeals for the Federal Circuit

IN RE SMITH

Before Nies, Chief Judge

ORDER

(Filed January 19, 1994)

Upon review of the order of the United States Court of Appeals for the Tenth Circuit, No. 93-631, dated November 29, 1993, informing the court that David L. Smith has been suspended form practice before the United States Court of Appeals for the Tenth Circuit,

IT IS ORDERED THAT:

Absent a response by Mr. Smith, the court will impose a reciprocal suspension within 14 days.

January 19, 1994
Date

/s/
Helen W. Nies
Chief Judge

cc: David L. Smith, Esq.

(2)

Supreme Court, U.S.
FILED
JUN 23 1994
OFFICE OF THE CLERK

No. 93-1547

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1993

IN RE:
DAVID L. SMITH

Petitioner

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

BURNS, FIGA & WILL, P.C.
Phillip S. Figa
One DTC, Penthouse Three
5251 DTC Parkway
Englewood, Colorado 80111
(303) 796-2626

ATTORNEYS FOR PETITIONER

June 23, 1994

14 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUPPLEMENT TO PETITION FOR
WRIT OF CERTIORARI 1

APPENDIX. A-01

TABLE OF AUTHORITIES

Page

Cases

Digital Equipment Corp. v. Desktop Direct, Inc.,
62 U.S.L.W. 4457 (1994) 5

Dunkin v. Louisiana Pacific Corp.,
No. 93-1878 (filed May 18, 1994) 5

G.J.B. & Associates, Inc. v. Singleton,
913 F.2d 824 (10th Cir. 1990) 3

In re Smith,
No. 93-1547, Petition for Writ of Certiorari 2, 6

Landgraf v. USI Film Products,
511 U.S. ____, 114 S.Ct. 1483 (1994) 4

McKnight v. General Motors Corporation,
62 U.S.L.W. 3771 (1994) 1-8

Rivers v. Roadway Express, Inc.,
511 U.S. ____, 114 S.Ct. 1510 (1994) 4

Statutes, Rules and Regulations — Page

42 U.S.C. § 1981, Section 101, Civil Rights Act of 1991 4,10

Rule 10.1, U.S. Supreme Court Rules 7

Rule 15.7, U.S. Supreme Court Rules 1

Rule 3.1, American Bar Association Model Rules 3, 4

Rule 3.1, Colorado Rules of Professional Conduct 3, 4

No. 93-1547

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1993

IN RE:
DAVID L. SMITH

Petitioner

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

David L. Smith, Esq., by his undersigned attorneys and pursuant to Rule 15.7 of the Supreme Court Rules, hereby submits this supplement to his Petition for Writ of Certiorari presented to this Court on March 31, 1994.

By this supplement, the petitioner seeks to call the Court's attention to its recent opinion in *McKnight v. General Motors Corporation*, 62 U.S.L.W. 3771 (1994). App. at 1 (reprinted from U.S.L.W., May 24, 1994 ed.). By its *per curiam* opinion, this Court announced its position regarding appeals of matters which are the subject of a split of authority among the lower courts,

holding that such appeals are not sanctionable because the rule of law involved is "not so clear as to make [the] position frivolous." *McKnight v. General Motors Corporation*, 62 U.S.L.W 3771 (1994). App. at 2. Thus, it is now apparent that the advancement of a position contrary to a particular circuit's precedent, where the issue is "not so clear" among the lower courts, does not make the advancement of that position frivolous, or, correspondingly, sanctionable.

McKnight supports Mr. Smith's assertion that the underlying conduct for which he was suspended, namely, asserting the interlocutory jurisdiction of the Tenth Circuit over attorney fee sanctions imposed by the district court, was not frivolous, not sanctionable, and, therefore, should not have resulted in his suspension from the practice of law. In three of the four cases relied on by the Tenth Circuit in suspending Mr. Smith, he was sanctioned for asserting a jurisdictional position well-grounded in law and fact, recognized as such by several circuits, and not contrary to any Supreme Court precedent. *See In re Smith*, No. 93-1547, Petition for Writ of Certiorari at 23-28. Indeed, the

Tenth Circuit itself has recognized that this question of interlocutory jurisdiction over appeals of attorney fee sanctions is one which is the subject of a "sharp split between the circuit courts." *G.J.B. & Associates, Inc. v. Singleton*, 913 F.2d 824, 829 (10th Cir. 1990). Under the rule of *McKnight*, the entry of such sanctions against Mr. Smith for advancing a legal argument, albeit contrary to precedent of the Tenth Circuit, but nevertheless recognized as the subject of a "sharp split" of authority, was erroneous. It follows then that his suspension, particularly to the extent that it is based on his consistent assertion of that jurisdictional position on appeal, magnifies that error.

Rule 3.1 of both the American Bar Association Model Rules and the Colorado Rules of Professional Conduct[1] provide, in pertinent part that: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of

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[1] Mr. Smith maintains his practice in the State of Colorado.

existing law." Clearly, *McKnight* stands for the proposition that, in the absence of controlling authority from this Court, a lawyer asserting a legal argument recognized as valid by some lower courts is not in violation of Rule 3.1 even if advanced in a circuit bound by contrary precedent.

Additionally, although it is not essential for this Court to reach the precise issue which is the subject of this split of authority among the circuits in order to find that Smith's suspension was improperly imposed, *McKnight* nevertheless supports the notion that resolution of the jurisdictional conflict is appropriate and necessary. In *McKnight* both the parties and the Court had the benefit of independent rulings by this Court on the underlying issue which was the subject of the split of authority relevant to the *McKnight* appeal, namely the retroactivity of section 101 of the Civil Rights Act of 1991, 42 U.S.C. § 1981. The cases of *Landgraf v. USI Film Products*, 511 U.S. ____, 114 S.Ct. 1483 (1994), and *Rivers v. Roadway Express, Inc.*, 511 U.S. ____, 114 S.Ct. 1510 (1994), were decided by this Court just prior to its consideration of the petition for certiorari and the sanctions issue

presented therein. In this case, however, this Court has not spoken on the interlocutory jurisdictional question presented by this petition. Even if, as in *McKnight*, the underlying issue is determined adversely to the position asserted by the petitioner, the resolution of the underlying issue would serve to clarify and offer guidance on a question which has vexed the circuit courts for over a decade and further the interest of judicial economy. Petitioner and his counsel are unaware of any action on which the Court has accepted review which confronts this issue.[2] Thus, this case provides an appropriate avenue by which this Court may finally resolve this question.[3]

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[2] This issue is, however, being raised by Mr. Smith in a separate Petition for Writ of Certiorari. *See Dunkin v. Louisiana Pacific Corp.*, No. 93-1878 (filed May 18, 1994).

[3] In reference to a then-pending case before this Court dealing with interlocutory appeals from orders of dismissal pursuant to settlement, Mr. Smith suggested in his Petition for Writ of Certiorari that the Court "may wish to use this case to clarify the *Cohen* rule should *Digital Equipment Corp. v. Desktop Direct, Inc.* prove to be an inadequate vehicle for clarifying the law in this area." *In re Smith*, No. 93-1547, Petition for Writ of Certiorari at 32 n. 6. This Court recently issued its opinion in *Digital Equipment*, 62 U.S.L.W. 4457 (1994). Since *Digital Equipment* is

Additionally, Mr. Smith's situation is far more serious than that of the petitioner's attorney in *McKnight*. The latter was sanctioned in the relatively small amount of $500, whereas Mr. Smith has been suspended from the practice of law in the Tenth Circuit until "each sanction order of [the Tenth Circuit] or the district court has been satisfied." *In re Smith*, 10 F.3d 723 (10th Cir. 1993). These sanctions now total more than $50,000, which he is financially unable to satisfy, thus subjecting Mr. Smith to multiple, excessive punishment for the same conduct. Furthermore, due to the reciprocal discipline rules of other courts before which Mr. Smith practices (including this Court), he is in further danger of being subjected to identical and simultaneous discipline in those courts, thus destroying completely his liberty and property interests in his good name, his reputation and his right and ability to engage in his livelihood.

---

essentially limited to the context of settlement agreements, the application of the *Cohen* doctrine in the context of appeals from attorney fee sanctions remains the subject of a sharp split among the circuit courts that can, and the petitioner submits, should be resolved in this case.

The Tenth Circuit's view regarding its interlocutory jurisdiction and its unfettered imposition of sanctions for asserting such jurisdiction, despite a "sharp split" of authority on the question, as well as the eventual suspension of those who offer a challenge to that view, stands in direct contravention to the recently announced precedent of this Court in *McKnight v. General Motors Corporation*. Absent review by this Court, the judgment of the Tenth Circuit will continue to impact the petitioner improperly and unjustly, as well as others before that court making good faith arguments on subjects which are not yet clear under the law. Thus, this petition represents Mr. Smith's only chance to challenge his suspension and restore his ability to practice law and engage in his livelihood as well as seek resolution of the jurisdictional issue which underlies the entire matter.

For these and the other reasons stated in the Petition for Writ of Certiorari, this Court should grant the petitioner's request for review. Accordingly, the petitioner respectfully submits that he has demonstrated that there are "special and important reasons" for review by this Court, S. Ct. R. 10.1, that his only recourse is

before this Court, and that his petition for writ of certiorari to the Tenth Circuit Court of Appeals should be granted. Notwithstanding, should this Court elect not to use this case to resolve the underlying circuit split regarding the interlocutory jurisdiction of the circuit courts, the petitioner respectfully requests that, at a minimum, and based on *McKnight*, this Court grant the Petition for Writ of Certiorari, vacate the Tenth Circuit's November 29, 1993 Order suspending the petitioner and remand this case for further proceedings consistent with *McKnight*.

Respectfully submitted,

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May 23, 1994

92-1113 McKnight v. General Motors Corporation.

Per Curiam.

After petitioner appealed the dismissal of his employment discrimination claim, respondent moved for dismissal of the appeal and for sanctions. Respondent argued that the appeal was frivolous in light of controlling decisions of the Court of Appeals for the Seventh Circuit holding that § 101 of the Civil Rights Act of 1991, 105 Stat. 1071, 42 U.S.C. § 1981 (1988 ed., Supp. IV), does not apply to cases arising before its enactment. *See Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (1992); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (1992). In an order dated September 30, 1992, the Court of Appeals granted respondent's motion, dismissed the appeal, and imposed a $500 sanction on petitioner's attorney.

The Court of Appeals correctly rejected petitioner's argument that § 101 applies retroactively. *See Landgraf v. USI Film Products*, 511 U.S. ____ (1994); *Rivers v. Roadway Express, Inc.*, 511 U.S. ____ (1994). However, if the only basis for the order imposing sanctions on petitioner's attorney was that his retroactivity argument was foreclosed by circuit precedent, the order was not proper. As petitioner noted in his memorandum opposing dismissal and sanctions, this Court had not yet ruled on the application of § 101 to pending cases. Filing an appeal was the only way petitioner could preserve the issue pending a possible favorable decision by this Court. Although, as of September 30, 1992, there was no circuit conflict on the retroactivity question, that question had divided the District Courts and its answer was not so clear as to make petitioner's position frivolous. *See Mozee, supra*, at 940-941 (Cudahy, J., dissenting).

Accordingly, the petition for a writ of certiorari is granted, the order imposing sanctions is vacated, and the case is remanded for further proceedings consistent with this opinion.

(3)

No. 93-1547

Supreme Court, U.S.
FILED
JUL 6 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

IN RE DAVID SMITH, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the disciplinary panel of the United States Court of Appeals for the Tenth Circuit erred in suspending petitioner from practicing law before the court of appeals until he pays monetary sanctions previously imposed against him by the court of appeals and a district court.

2. Whether the court of appeals disciplinary panel erred in not taking account of petitioner's alleged inability to pay monetary sanctions when petitioner did not raise the issue until he filed a petition for rehearing.

3. Whether the court of appeals disciplinary panel abused its discretion, or denied petitioner due process, by denying petitioner's request for an evidentiary hearing.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

American Policyholders Ins. Co. v. *Nyacol Products, Inc.*, 989 F.2d 1256 (1st Cir. 1993), cert. denied, 114 S. Ct. 682 (1994)	11
Casillan v. *Regional Transp. Dist.*, cert. denied, No. 93-1771 (June 20, 1994)	7
Coastal Transfer Co. v. *Toyota Motor Sales, U.S.A., Inc.*, 833 F.2d 208 (9th Cir. 1987)	3
Codd v. *Velger*, 429 U.S. 624 (1977)	12
Cohen v. *Beneficial Insdus. Loan Corp.*, 337 U.S. 541 (1949)	3
Deherrera v. *City of Denver*, Nos. 93-1070 and 93-1139 (10th Cir. Sept. 3, 1993)	2
Dunkin v. *Louisiana-Pacific Corp.*, Nos. 92-1230 and 92-1381 (10th Cir. Feb. 11, 1993), cert. denied, 114 S. Ct. 87 (1993)	9
G.J.B. & Assocs. v. *Singleton*, 913 F.2d 824 (10th Cir. 1990)	2-3
Hendrix v. *Page* (*In re Hendrix*), 986 F.2d 195 (7th Cir. (1993)	3
Keating v. *FERC*, 927 F.2d 616 (D.C. Cir. 1991)	11
McEnery v. *Merit Systems Protection Board*, 963 F.2d 1512 (Fed. Cir. 1992)	3
McKnight v. *General Motors Corp.*, 114 S. Ct. 1826 (1994)	9
Pierce v. *Underwood*, 487 U.S. 552 (1988)	12

Cases–Continued: Page

Software Centre Int'l, In re, 994 F.2d 682 (9th Cir. 1993) 10

Statutes and rules:

28 U.S.C. 1291 3
28 U.S.C. 1927 ..... 2, 3, 4, 5
Fed. R. App. P. 38 ..... 4, 5, 6
Fed. R. Civ. P. 11 2
10th Cir. R. 46.5 4
10th Cir. R., Addendum III, § 4.3 12

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1547

IN RE DAVID SMITH, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

The Solicitor General submits this brief on behalf of respondent, the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 10 F.3d 723.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1993. A petition for rehearing was denied on January 3, 1994. Pet. App. A7. The petition for a writ of certiorari was filed on March 31, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A disciplinary panel of the Tenth Circuit suspended petitioner, an attorney, from the practice of law before that court until he pays all sanctions previously imposed on him by that court and the district court. Pet. App. A3. The previously imposed sanctions arose out of cases in which petitioner had filed motions or appeals deemed frivolous by the courts in which they were filed. Petitioner seeks review of the Tenth Circuit's order suspending him from practice before that court until the sanctions are paid.

1. On September 3, 1993, the Tenth Circuit entered an order and judgment in *Deherrera* v. *City of Denver*, Nos. 93-1070 and 93-1139 (Pet. App. A102-A112), dismissing the appeal and denying an accompanying petition for writ of mandamus. The court of appeals concluded that it lacked jurisdiction because the appeal was from an order imposing sanctions against petitioner in a case in which he was counsel of record that was still pending in the district court.[1] Under the controlling Tenth Circuit

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[1] The *Deherrera* appeal arose out of a February 4, 1993, district court order in an employment discrimination case in which petitioner was counsel for plaintiff. The court ordered that, pursuant to 28 U.S.C. 1927, petitioner was to pay the attorneys' fees incurred by the opposing party in responding to petitioner's four motions for reconsideration of a magistrate judge's order. Pet. App. A104. Prior to those four motions, petitioner had filed six other motions for reconsideration of the magistrate judge's order and had been cautioned about the lack of merit of those motions. *Id.* at A104-A105. The original March, 1992, magistrate judge's order that was the subject of the reconsideration motions had imposed sanctions against petitioner under Federal Rule of Civil Procedure 11.

On March 1, 1993, the district court entered an order that petitioner pay the $2,287.50 imposed under Rule 11 by the March,

precedent of *G.J.B. & Assocs.* v. *Singleton*, 913 F.2d 824 (1990), the attorney sanction order was not a final order appealable under 28 U.S.C. 1291 and was not appealable under the collateral order doctrine of *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Pet. App. A105-A106.

The court of appeals noted that petitioner cited *G.J.B.* in his brief on the jurisdictional question (see Pet. App. A67-A83), but did "not recognize it as controlling authority," and instead contended that the sanction order was appealable under *Cohen*. *Id.* at A106. The court pointed out that in *G.J.B.* it had rejected petitioner's precise argument and the authority from other circuits on which petitioner relied.

The appellees in *Deherrera* claimed that the appeal was frivolous and requested sanctions of $1,200 in attorneys fees incurred responding to the appeal. Pet. App. A106. The court of appeals found that petitioner's argument was not "a good faith argument for overruling or creating an exception to *G.J.B.*" *Id.* at A109. The court concluded that petitioner "is simply 'appealing in the face of dispositive contrary authority without making arguments for overruling it,' which is a basis for finding his appeal frivolous." *Id.* at A109-A110 (citing *Hendrix* v. *Page* (*In re Hendrix*), 986 F.2d 195, 200 (7th Cir. 1993); *McEnery* v. *Merit Systems Protection Board*, 963 F.2d 1512, 1516-1517 (Fed. Cir. 1992); *Coastal Transfer Co.* v. *Toyota Motor Sales, U.S.A., Inc.*, 833 F.2d 208, 212 (9th Cir. 1987)).

1992, order and the $7,627.50 imposed under Section 1927 by the February, 1993, order. Petitioner sought immediate appellate review of the March 1, 1993, order and the court of appeals directed the parties to brief the question of jurisdiction. Pet. App. A105.

The court further stated:

> what makes this appeal particularly egregious is the fact that twice within the past seven months we have similarly dismissed appeals of sanction orders filed by [petitioner] and cited *G.J.B.* on both occasions. *See Sandlin v. Canady (In re Canady)*, No. 92-1169 (10th Cir. April 27, 1993) (Order and Judgment on petition for rehearing);[2] *Dunkin v. Louisiana-Pacific Corp.*, Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993)[, cert. denied, 114 S. Ct. 87 (1993)] (Order dismissing appeal and remanding for imposition of sanctions for frivolous appeal).[3]

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[2] In *Sandlin* v. *Canady* (Pet. App. A9-A12), petitioner had filed an appeal from a district court order that imposed sanctions against him and also resolved some, but not all, of the underlying claims in the litigation. The court of appeals initially affirmed the decision of the district court, but subsequently vacated its original decision and dismissed the appeal for lack of jurisdiction. *Id.* at A10-A11. Citing *G.J.B.*, the court's dismissal order expressly informed petitioner that "[t]he order sanctioning [you] is not yet appealable." Pet. App. A11.

[3] In *Dunkin* (Pet. App. A31-A34), petitioner had filed appeals from two other district court sanction orders against him in an action still pending in district court. The court of appeals dismissed the appeals on the basis of *G.J.B.* See Pet. App. A34. In addition, the court reviewed the appellees' request for sanctions against petitioner for his appeals under 28 U.S.C. 1927, Fed. R. App. P. 38 and 10th Cir. R. 46.5 and petitioner's response. The court stated that "[t]he law is well established in this circuit that an order sanctioning counsel currently of record is not appealable before entry of final judgment." Pet. App. A33. The court determined that because petitioner nonetheless had chosen to pursue an appeal "after he was informed by this court of a jurisdictional defect," and also filed another appeal with the identical defect, sanctions were appropriate. *Id.* at A34. The court of appeals remanded for assessment of sanctions. *Ibid.*

Pet. App. A110. The court concluded that petitioner's conduct in the appeal therefore was sanctionable under Federal Rule of Appellate Procedure 38[4] and 28 U.S.C. 1927[5] and ordered petitioner to pay $1,200 to appellees. Pet. App. A110-A112. The court also rejected petitioner's mandamus petition.

The court found that petitioner's "actions in both this appeal and other recent appeals warrant review by the court's disciplinary panel." Pet. App. A104. It concluded that petitioner's "practice of appealing in light of contrary controlling authority raises concerns about his fitness to practice before this court." *Id.* at A109-A110. The court referred the matter to the court's attorney disciplinary panel for further proceedings. *Id.* at A112.

2. The Tenth Circuit attorney disciplinary panel issued an order on September 15, 1993, directing petitioner to show cause in writing as to:

> why he should not be fined, disbarred or otherwise disciplined for his actions in * * * Deherrera v. Denver after the entry of this court's orders in Sandlin v. Canaday [*sic*] * * * and Dunkin v. Louisiana-Pacific Corp. * * *. The panel in Deherrera referred this matter to this Discipline Panel because the appeal and petition for writ of mandamus were frivolous. In Casillan v. Regional

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[4] Federal Rule of Appellate Procedure 38 provides:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

[5] Section 1927 provides in relevant part:

> Any attorney * * * who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

> Transportation District, [986 F.2d 1426 (Table)] (10th Cir. January 15, 1993), the court also found the appeal to be frivolous.[6] Filing a frivolous appeal is a ground for discipline because it is a violation of 10th Cir. R. 46.5.

Pet. App. A5-A6.

On October 4, 1993, petitioner filed a response, repeating the arguments that the sanctions order in

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[6] In *Casillan* (Pet. App. A39-A62), the district court had dismissed a complaint petitioner had filed because it failed to state claims upon which relief could be granted. See *id.* at A46. The district court also adopted the magistrate judge's order that petitioner pay the attorneys' fees incurred by the defendants in responding to an "unwarranted and frivolous" motion to reconsider filed by petitioner. See *id.* at A57.

The court of appeals affirmed. In addition, the court of appeals imposed sanctions against petitioner under Fed. R. App. P. 38 for filing a frivolous appeal. Pet. App. A60-A62. The court of appeals emphasized:

> Defendants are entitled to some form of compensation for having been dragged so pointlessly through the courts for the past two years. This action has been groundless from the day of filing, and the agonies visited upon the defending parties and their counsel by [petitioner] and his relentless aggressiveness cannot be allowed to go unanswered. Attorneys who confuse misguided zeal and the pursuit of unfounded legal theories for championing the cause of justice must recognize there is a price for their efforts. The cause of justice is not an invitation to batter blameless parties, nor is it a substitute for proper investigation and grounding of legal proceedings. When the lack of preparation rises to the level of marked indifference to or ignorance of the law, as it has in this case, justice demands compensation.

Id. at A61-A62. Petitioner's petition for a writ of certiorari, seeking review of the sanctions order, was denied by this Court on June 20, 1994. *Casillan* v. *Regional Transp. Dist.*, No. 93-1771.

Deherrera should be appealable under *Cohen* and contending that he was making good faith arguments for extension, modification or reversal of current law as permitted under local rules as well as establishing a record for further review by this Court. See Pet. C.A. Verified Response to Order to Show Cause 13-15 (Oct. 4, 1993). Petitioner also contended that his petition for writ of mandamus was appropriate because his motions for reconsideration in the district court were not vexatious or unreasonable and that the mandamus case had not been cited as a basis for the disciplinary referral. *Id.* at 15-19. Petitioner requested that he be notified if charges were brought against him for actions taken in cases other than *Deherrera*. *Id.* at 20-21.

On October 20, 1993, the disciplinary panel set the matter for hearing on November 12, 1993, and ordered that petitioner file a supplemental response addressing why he should not be disciplined for filing frivolous appeals in *Casillan*. See Pet. C.A. Request for Additional Time (Oct. 22, 1993). On October 22, 1993, petitioner submitted a request for additional time to file a supplemental response, and requested, for the first time, an evidentiary hearing. *Ibid.*

On November 2, 1993, petitioner filed a supplemental response, contending that he should not be disciplined for his appeals in *Casillan* because he was denied due process by not being notified that sanctions were being considered or given an opportunity to respond before final judgment in *Casillan*. Pet. C.A. Verified Supp. Response to Order to Show Cause (Supp. Response) 18-20 (Nov. 2, 1993). Petitioner contended that he presented colorable legal issues in his appeals and challenged the trial judge's impartiality. Petitioner asserted that his case would require presentation of unspecified "exten-

sive evidentiary material, including expert testimony" and requested an evidentiary hearing. *Id.* at 29-30.

The disciplinary panel denied petitioner's request for an evidentiary hearing and heard oral argument on November 12, 1993. At oral argument, petitioner admitted that he had not paid any of the sanctions that had been imposed on him by the Tenth Circuit or the district court. Pet. App. A3.

On November 29, 1993, the disciplinary panel ordered that petitioner be suspended from the practice of law before that court "until all sanctions are paid." Pet. App. A3. It stated that petitioner "may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied." *Ibid.* The court rejected petitioner's argument that the appeals in *Deherrera* and *Casillan* were not frivolous, stating that it was bound by the prior rulings of the panels in those cases that the appeals were frivolous. *Id.* at A2.

Petitioner filed a petition for rehearing and suggestion of rehearing en banc asserting, for the first time, that he was unable to pay the sanctions, proposing possible alternative sanctions, and requesting a hearing. Pet. C.A. Rehearing Pet. 3-9.[7] The rehearing petition was denied. Pet. App. A7. Petitioner's motions for stay of his suspension order were denied by the court of appeals and by Justice Ginsburg. See *In re David L. Smith*, Application for Stay, No. 93-673 (Feb. 16, 1994).

ARGUMENT

1. Petitioner's principal argument (Pet. i, 20, 23-34) is that his appeal in *Deherrera* was not frivolous because

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[7] Petitioner accompanied the rehearing petition with a declaration concerning his financial status.

the Tenth Circuit precedent conflicts with decisions of other circuits that permit appeals from district court orders sanctioning attorneys under *Cohen* while the underlying district court action is still pending. This argument misconstrues the basis for the court of appeals' suspension of petitioner. The only issue before the disciplinary panel was what discipline, if any, to impose on petitioner for litigation conduct that already had been determined to be frivolous. The disciplinary panel did not reconsider the determination by the merits panel in *Deherrera* that petitioner's appeal was frivolous. See Pet. App. A2.

This case is not an appropriate vehicle for resolution of the question of whether petitioner's appeal in *Deherrera* was frivolous. If petitioner wished to have this Court review the frivolousness of his appeal in *Deherrera* or the jurisdictional issue regarding interlocutory appeals of sanction orders, the proper course would have been to file a petition for certiorari in that case. Petitioner followed that course in *Casillan*, the other appeal underlying the present suspension order, as well as in *Dunkin*, and the Court denied both petitions. See note 6, *supra*; 114 S. Ct. 87 (1993). Having failed to seek direct review in a proceeding where the issues were presented and addressed by the court of appeals, petitioner cannot seek review in this collateral proceeding.[8]

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[8] In a Supplement to Petition for Writ of Certiorari filed June 23, 1994, petitioner points to the ruling in *McKnight* v. *General Motors Corp.*, 114 S. Ct. 1826 (1994), in which the Court vacated an order imposing sanctions for a frivolous appeal where the sanctions may have been based solely on the ground that the attorney's argument was foreclosed by circuit precedent and the attorney had challenged the precedent and pursued the argument to the Supreme Court. As explained above, the questions of the frivolity

2. Petitioner also contends (Pet. i, 21-22, 35-37) that the disciplinary panel should not have conditioned his reinstatement on payment of existing sanctions, because he lacks the financial resources to pay the sanctions.

Petitioner did not raise this issue until he filed a petition for rehearing. Yet petitioner himself admitted, "an ability to pay argument is in the nature of an affirmative defense, thus placing the impetus on the party asserting it to come forward with evidence of financial status." Rehearing Pet. 6. Petitioner concedes that "no such argument or evidence was presented in response to the Order to Show Cause, or at the [disciplinary] hearing." *Ibid.*[9] Because petitioner failed to present the issue to the court of appeals in a timely manner and raised it for the first time in his petition for rehearing, he waived the issue. See, *e.g.*, *In re Software Centre Int'l, Inc.*, 994 F.2d 682, 684 n.2 (9th Cir. 1993);

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of petitioner's appeals and the validity of the sanctions orders are not before the Court in the pending matter, which arises out of the disciplinary panel's imposition of a suspension order for failure to pay court imposed sanctions. Moreover, the disciplinary panel's action was not based only on the appeal in *Deherrera* that was contrary to circuit precedent, but also on petitioner's frivolous appeal in *Casillan* concerning unrelated issues.

[9] In his petition for rehearing, petitioner claimed that he "had no legal or reasoned basis for asserting an inability to pay" until the disciplinary panel conditioned his reinstatement on payment of outstanding sanctions. C.A. Rehearing Pet. 7. That is incorrect. Monetary sanctions already had been imposed on petitioner; his inability to pay those sanctions would certainly have been relevant to the Disciplinary Panel in its consideration of what remedy to impose for petitioner's failure to pay those sanctions. In addition, the court's show-cause order explicitly directed petitioner to "show cause in writing why he should not be *fined*, disbarred or otherwise disciplined," Pet. App. A5 (emphasis added), thus giving petitioner notice that the court's sanction might be a monetary one.

American Policyholders Ins. Co. v. *Nyacol Products, Inc.*, 989 F.2d 1256, 1264 (1st Cir. 1993), cert. denied, 114 S. Ct. 682 (1994); *Keating* v. *FERC*, 927 F.2d 616, 625-626 (D.C. Cir. 1991).[10]

3. Petitioner asserts (Pet. i, 22, 37-41) that the disciplinary panel abused its discretion and violated due process by failing to provide him with an evidentiary hearing. Petitioner failed, however, to give the disciplinary panel adequate cause to order an evidentiary hearing. Petitioner did not offer the disciplinary panel any indication of what factual issues he wished to develop or what kind of evidence he intended to present.[11] See Supp. Response 29-30. Absent explanation of why an evidentiary hearing was warranted, the panel did not abuse its discretion or deny petitioner due process by declining to grant petitioner's conclusory demand for such a hearing. Cf. *Codd* v. *Velger*, 429 U.S. 624 (1977) (per curiam) (due process does not require evidentiary

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[10] In any event, it is far from clear that petitioner is financially unable to satisfy the outstanding penalties, as he claims. In his rehearing petition, petitioner listed approximately $88,000 in assets, far more than the amount of the penalties. See Pet. C.A. Rehearing Pet., Affidavit of David L. Smith (financial statement). Petitioner claimed to have approximately $247,000 in debts, exclusive of the penalties themselves, but virtually all of the claimed debt is a loan from petitioner's wife. See *ibid.*; Pet. App. A146. Petitioner did not assert in his rehearing petition, nor does he assert now, that he would be obligated to repay the loan to his wife before he could use his assets to satisfy the penalties imposed by the courts.

[11] Petitioner's supplemental response stated that he intended to present "extensive evidentiary materials, including expert testimony," but offered no hint as to the nature of such evidence. See Supp. Response 29.

hearing when litigant has not raised an issue about a factual dispute).[12]

Petitioner now asserts that, if he had been granted an evidentiary hearing, he would have presented evidence showing that (1) he was "financially unable to pay the underlying sanctions" and (2) "the appeals in the underlying cases were [not] frivolous." Pet. 38-39. It is not credible that petitioner requested an evidentiary hearing in order to present evidence on the financial issue because, as noted above, he made no reference to his financial condition in his response to the show-cause order or at the disciplinary hearing itself. As for the second issue, whether his appeals in *Deherrera* and *Casillan* were frivolous is not a question of fact that would have warranted an evidentiary hearing, even if that issue had been relevant. Cf. *Pierce* v. *Underwood*, 487 U.S. 552, 558 & n.1 (1988) (whether government's legal position is "substantially justified" for purposes of fee award under Equal Access to Justice Act "is not [a question] of fact").

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[12] Contrary to petitioner's assertion, the rules of the Tenth Circuit do not establish a right to an evidentiary hearing in attorney discipline proceedings, but rather provide that such a hearing "may" be conducted. See 10th Cir. R., Addendum III, § 4.3.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1994